TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 748

INTERSTATE COMMERCE COMMISSION, PETITIONER

vs.

THE UNITED STATES OF AMERICA, ON THE RELATION OF J. C. CAMPBELL, R. M. CAMPBELL, ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED MARCH 8, 1933

CERTIORARI GRANTED MARCH 20, 1933

(37445)

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Court of Appeals of the District of Columbia

No. 5816

UNITED STATES OF AMERICA on the Relation of J. C. CAMPBELL et al., Appellants,

vs.

THE INTERSTATE COMMERCE COMMISSION.

a Supreme Court of the District of Columbia.

At Law.

No. 81439.

UNITED STATES OF AMERICA on the Relation of J. C. CAMPBELL, R. M. Campbell, J. R. Campbell, C. W. Amsler, and Henry Amsler, Trading as The Birch Valley Lumber Company, a Partnership, Relators,

vs.

THE INTERSTATE COMMERCE COMMISSION, Respondent.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Petition for a Writ of Mandamus.*

Filed June 20, 1932.

In the Supreme Court of the District of Columbia.

At Law.

No. 81439.

UNITED STATES OF AMERICA on the Relation of J. C. CAMPBELL, R. M. Campbell, J. R. Campbell, C. W. Amsler, and Henry Amsler, Trading as The Birch Valley Lumber Company, a Partnership, Relators,

VS.

THE INTERSTATE COMMERCE COMMISSION, Respondent.

To the Supreme Court of the District of Columbia:

The relators, J. C. Campbell, R. M. Campbell, J. R. Campbell, C. W. Amsler and Henry Amsler, trading as The Birch Valley Lumber Company, a partnership, respectfully show to this honorable Court as follows:

I. That The Birch Valley Lumber Company was, until the 1st day of January, 1928, a corporation duly organized and existing under the laws of the State of West Virginia.

II. That the said Birch Valley Lumber Company, a corporation, in accordance with a resolution adopted by the stockholders of said corporation on the 29th day of November, 1927, and in accordance with the statutes and
2 the code of laws of the State of West Virginia, was dissolved as of and on the 1st day of January, 1928. A certified copy of the certificate of said dissolution, dated the 4th day of April, 1928, attested and signed by the Secretary of the State of West Virginia, is attached hereto, marked Exhibit A, and prayed to be made a part hereof.

III. That by deed dated the 1st day of January, 1928, and by and between The Birch Valley Lumber Company, a corporation, party of the first part, and J. C. Campbell, R. M. Campbell, J. R. Campbell, C. W. Amsler and Henry Amsler, partners, trading as The Birch Valley Lumber Company, parties of the second part, the said Birch Valley Lumber Company, a corporation, for a valid consideration received and acknowledged, transferred, assigned, and conveyed, to the said J. C. Campbell, R. M. Campbell, J. R. Campbell, C. W. Amsler and Henry Amsler, all the property and assets of the said Birch Valley Lumber Company, a corporation, both tangible and intangible, real, personal or mixed, and including all accounts and notes receivable and choses in action. Said deed was presented and admitted to record in the office of the County Court Clerk for Nicholas County of the State of West Virginia on, to wit: June 1, 1932. A certified copy of the deed is attached here-

to, marked Exhibit B, and prayed to be made a part hereof.

IV. That the respondent is the Interstate Commerce Commission as now constituted, created and established under Sections 11 and 24 of the Interstate Commerce Act, and hereinafter called the Commission.

3 V. That Section 3 of the Interstate Commerce Act provides that it shall be unlawful for any common carrier subject to the provisions of said Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

VI. That Section 6 (1) of the Interstate Commerce Act provides that every common carrier subject to the provisions of said Act shall file with the Commission schedules showing rates and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad when a through route and joint rate have been established; and that if no joint rate over the through route has been established, the several carriers in such through route shall file with the Commission the separately established rates and charges applied to the through transportation.

VII. That Section 8 of the Interstate Commerce Act provides that in case any common carrier subject to the provisions of said Act shall do, cause to be done, or permit to be done any act, matter, or thing in said Act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in said Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of

4 said Act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

VIII. That Section 9 of the Interstate Commerce Act provides that any person or persons claiming to be damaged

by any common carrier subject to the provisions of the said Act may either make complaint to the Commission, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of said Act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure therein provided for he or they will adopt.

IX. That Section 13 of the Interstate Commerce Act provides that any person, firm, corporation, or company complaining of anything done or omitted to be done by any common carrier subject to the provisions of said Act may apply to the Commission by petition, and if the carriers complained of do not satisfy the complaint within the time specified, it shall be the duty of the Commission to investigate the matter complained of in such manner and by such means as it shall deem proper.

X. That Section 16 of the Interstate Commerce Act provides that if, after hearing on such complaint the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of said Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which it is entitled on or before the day named.

XI. By the provisions of Section 17 of the Interstate Commerce Act the Commission is authorized to make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, or before any division of the Commission. Acting under the authority so conferred the Commission adopted the following rule with respect to the determination of the amount of reparation due:

"V. Reparation Statements—Formal Claims for Reparation, Based Upon Findings of the Commission—

(a) When the commission finds that reparation is due but that the amount can not be ascertained upon the record before it, the complainant should immediately prepare a statement showing details of the shipments on which reparation is claimed, in accordance with Form 5. (See p. 35.)

The statement should not include any shipment not covered by the commission's findings, or any shipment on which complaint was not filed with the commission within the statutory period. (See Rule III.) The statement together with the paid freight bills on the shipments, or true copies thereof should then be forwarded to the carrier which collected the charges for checking and certification as to its accuracy. The certificate must be signed in ink by a general accounting officer of the carrier and should cover all of the information shown in the statement. If the carrier which collected the charges is not a defendant in the case its certificate must be concurred in by like signature on behalf of a carrier defendant.

(b) If the shipments moved over more than one route a separate statement should be prepared for each route, and separately numbered, except that shipments as
6 to which the collecting carrier is in each instance the same may be listed in a single statement if grouped according to routes.

(c) Statements so prepared and certified shall be filed with the commission, whereupon it will consider entry of an order for reparation. The filing of statements will not stop the running of the statute of limitations as to shipments not covered by complaint or supplemental complaint. (See Rule III.)

(d) All discrepancies, duplications, or other errors in the statements should be adjusted by the parties and correct agreed statements submitted to the commission."

XII. That in accordance with the provisions of the said Act and the Rules of Practice of the Commission, The Birch Valley Lumber Company, a corporation, and the predecessor in interest of the relators, on, to wit: the 11th day of January, 1927, filed with the Commission a complaint against Strouds Creek and Muddlety Railroad Company, The Baltimore and Ohio Railroad Company, and other defendant carriers named in said complaint, a copy of which is attached hereto, marked Exhibit C, and prayed to be made a part hereof.

XIII. The said complaint described in Paragraph XII hereof alleged, among other things—

(a) that the complainant was and had been engaged in the manufacture and sale of lumber, with its principal office and place of business at Tioga, West Virginia;

(b) that the defendants named were common carriers subject to the provisions of the Interstate Commerce Act;

(c) that complainant's mill was located at Tioga, West Virginia, on the railway of the defendant Strouds Creek and Muddlety Railroad Company, extending from Delphi, West Virginia, to Allingdale, West Virginia, a dis-
7 tance of approximately ten miles and connecting with The Baltimore and Ohio Railroad at the latter point;

(d) that complainant in its regular course of business shipped lumber via through routes from Tioga, West Virginia, to various destinations in the United States and Eastern Canada; that defendants had established through routes from Tioga, West Virginia, to the said various destinations, but had published no joint rates applicable to the through transportation of lumber via such established through routes; that in consequence of the absence of such joint rates, complainant's traffic had been, and then was being, transported at the separately established rates of the Strouds Creek and Muddlety Railroad Company from Tioga, West Virginia, to Allingdale, West Virginia, and The Baltimore and Ohio Railroad Company and its connections from Allingdale, West Virginia, to destinations on its line and on the lines of its connections applied to the through transportation of complainant's shipments in the absence of joint rates, to wit: $15 per car from Tioga to Allingdale, plus the rates applicable from said Allingdale to the said several destinations;

(e) that complainant's competitors shipping from the same general territory were accorded rates less than complainant to the extent of $15 per car for substantially similar service, and that complainant had been injured thereby to its damage;

(f) that the complainant's through rates of $15 per car plus the rates applicable from said Allingdale, had been, were then, and for the future would be unreasonable
8 and unduly prejudicial to complainant and unduly preferential to complainant's competitors to the extent of $15 per car in violation of the Interstate Commerce Act.

XIV. The complainant prayed that after due hearing and investigation the Commission order the defendants to cease and desist from the aforesaid violations of the Interstate Commerce Act, establish joint rates from Tioga, West Virginia, to the several destinations described, the same as from said Allingdale and other points in the same general territory, and to pay reparation to complainant as damages for the injuries caused by the unlawful charges theretofore made and then being made.

XV. Defendant Strouds Creek and Muddlety Railroad filed an answer to said complaint, a copy of said answer being attached hereto, marked Exhibit D, and prayed to be made a part hereof.

XVI. Answers of the defendants other than Strouds Creek and Muddlety Railroad were severally filed, a copy of the answer filed by The Baltimore and Ohio Railroad Company, The Baltimore and Ohio Chicago Terminal Railroad Company, The Cincinnati, Indianapolis and Western Railroad Company, Dayton and Union Railroad Company, and the Staten Island Rapid Transit Railroad Company being attached hereto, marked Exhibit E, and prayed to be made a part hereof.

XVII. Thereafter evidence was taken on behalf of complainant and defendants, and the matter was heard on oral argument before Division 3 of the Commission. By
9 the decision and report of the Commission, made through its Division 3, on May 19, 1928, it was found, among other things, that—

(1) "On shipments of lumber the S C & M charges $15 per car for its service to the junction point, which is in addition to the rate from the junction."

(2) "The lumber is sold in competition with that produced throughout the country and especially that produced in the same general territory."

(3) "There appears to be no question that complainant is forced to base its prices on the group rates and absorb the charges of the S C & M."

(4) "The rates assailed, insofar as they apply within the United States, were not and are not unreasonable, but were, are, and for the future will be unduly prejudicial to complainant and unduly preferential of its competitors in the same general origin territory to the extent that they exceeded, exceed or may exceed the rates contemporane-

ously maintained on like traffic from the group which includes Allingdale, West Virginia."

XVIII. But, notwithstanding its findings of damage set forth in Paragraph XVII, the Commission made no award of reparation for the damages so found to have resulted from the said violations of the Interstate Commerce Act by the defendants, stating that "the record will not support an award of reparation based on the undue prejudice found to exist."

XIX. By order of the Commission entered May 29,
10 1928, the defendants were ordered to cease and desist on or before August 15, 1928, and thereafter to abstain from practicing the undue preference and prejudice found to exist, as hereinbefore set forth, and to establish, maintain, and apply regulations and practices which would prevent and avoid the undue prejudice and preference so found to exist. Copies of the said report and order entered May 29, 1928 are attached hereto, marked Exhibit F and Exhibit G, respectively, and prayed to be made a part hereof.

XX. Thereafter the defendants, other than the Strouds Creek and Muddlety Railroad Company, filed a petition for reconsideration and reargument before the entire Commission, and for postponement of the effective date of the order. By order of the Commission, dated the 1st day of November, 1928, the said petition was denied and the aforesaid order entered May 29, 1928, was made effective on the 14th day of January, 1929.

XXI. That having found that the relator's lumber was sold in competition with that produced in the same general territory, that complainant was forced to base its prices on the group rates, and absorb a charge of $15 per car by reason of the defendant carriers' violation of said Act in publishing through rates $15 per car higher than the rates enjoyed by complainant's competitors, and that said violation of the Act unduly prejudiced complainant and preferred complainant's competitors in the same general territory, it therefore became the duty of the Commis-
11 sion to find complainant entitled to an award of damages for the undue prejudice found to exist, to determine the amount of damages to which complainant was entitled, and in due time to enter an order directing the carriers to pay reparation to the relators in an amount

measured by $15 per each and every car of lumber shipped by the complainant and the relators during the statutory period.

XXII. That on the 29th day of July, 1930, The Birch Valley Lumber Company, the successor and assignee of The Birch Valley Lumber Company, a corporation, by its attorneys, filed a petition for rehearing and/or reargument for the sole purpose of enabling the Commission to correct its erroneous conclusion that "the record will not support an award of reparation based on the undue prejudice found to exist," and make an award of reparation in conformity with its findings set forth in Paragraph XVII hereof, and to set the case for further hearing under Rule 5 of the Commission's Rules of Practice to determine the total amount of reparation to which complainant is entitled under the Commission's findings set out in Paragraph XVII. On the 2nd day of February, 1931, the said petition was denied by the Commission. A copy of said order is attached hereto as Exhibit H, and prayed to be made a part hereof.

XXIII. That the Commission is required by the provisions of the said Act, upon a finding of damages sustained by a violation of said Act, to make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named; that the duty of the Commission to enter such order does not involve the exer-
12 cise of discretion or judgment, but is purely ministerial in nature following as a matter of law from the findings of violation of law and resulting damage, and the requirements of said Act; that the Interstate Commerce Act provides the relators with no remedy by appeal or writ of error; that complaint to the Commission having been made, by the provisions of Section 9 of said Act described in Paragraph VIII hereof, the relators are barred from maintaining an action in any court for the damages sustained by the violations of law described in Paragraph XIII hereof, and found by the Commission as hereinbefore set forth in Paragraph XVII hereof, that the neglect, failure, and refusal of the Commission to enter such an order for the payment of damages was and is an arbitrary failure and refusal to comply with and execute the provisions of the Interstate Commerce Act; and that the aforesaid neglect, failure, and refusal of the Commission to enter an order for the payment

of damages to relators does injury to relators for which they are without adequate remedy.

Wherefore the relators pray that this honorable court issue its writ of mandamus commanding the respondent Commission to determine the full amount of damages sustained by the relators in consequence of the aforesaid violations of the Interstate Commerce Act as found by the Commission and described in Paragraph XIII hereof, the damage sustained by the relators being measured by such amount as the payments of charges to the said carriers on shipments by The Birch Valley Lumber Company, a corporation, and the relators, from Tioga, West Vir-
13 ginia, on and after the 11th day of January, 1925, exceeded the rates contemporaneously maintained on like traffic from the group which included Allingdale, West Virginia, and to enter an order directing the payment to relators by the Strouds Creek and Muddlety Railroad, The Baltimore and Ohio Railroad Company and its connecting carriers of the full amount of said damages with interest thereon, and for such other and further order or relief as may be necessary or proper.

J. C. CAMPBELL,
R. M. CAMPBELL,
J. R. CAMPBELL,
C. W. AMSLER, and
HENRY AMSLER, TRADING AS
THE BIRCH VALLEY LUMBER COMPANY,
Relators,

By J. C. CAMPBELL.
J. C. CAMPBELL.

WILLIAM S. BRONSON,
JOHNSTON B. CAMPBELL,
A. HENRY WALTER,
Attorneys for Relators.

STATE OF WEST VIRGINIA,
County of Nicholas, ss:

J. C. Campbell, being duly sworn, deposes and says: that he resides at Tioga, West Virginia, and that he, R. M. Campbell, J. R. Campbell, C. W. Amsler and Henry Amsler are members of a partnership trading as The Birch Valley Lum-

ber Company, that he has read the foregoing petition, and that the allegations therein contained are true to the best of his knowledge and belief.

J. C. CAMPBELL.
J. C. CAMPBELL.

Sworn to before me, a notary public, this 15th day of June, 1932.

PAUL McNEILL, [SEAL.]
Notary Public.

14 EXHIBIT A.

Certified Copy of Certificate of Dissolution Described in Paragraph II.

15 STATE OF WEST VIRGINIA.

[STATE SEAL.]

Certificate.

I, George W. Sharp, Secretary of State of the State of West Virginia, do hereby certify that J. C. Campbell, President of The Birch Valley Lumber Company, a corporation created and organized under the laws of the State of West Virginia, has certified to me under his signature and the corporate seal of said corporation, that, at a meeting of the stockholders of said corporation, regularly held in accordance with the requirements of the law of said State, at the office thereof, in the Town of Tioga, West Virginia, on the 29th day of November, 1927, at which meeting all of the stock of such corporation being represented by the holders thereof, in person or by proxy, and voting for the following resolution, the same was duly and regularly adopted and passed, to-wit:

"Resolved, that The Birch Valley Lumber Company, a corporation, do discontinue the business of said corporation as of January 1st, 1928, and in accordance with Section 56, Chapter 53, of the Code and that proper action be taken to pay all debts thereof, and for the devision of its property and assets amongst the stockholders."

And I further certify that a proper certificate of the publication of the notice required by section 56 of Chapter 53 of the Code of West Virginia by the said corporation has been filed in my office, and that the Auditor of the State of West Virginia has certified to me that the said corporation is not delinquent in the payment of the license tax on its charter.

Wherefore I do declare that said notice was duly published, and that the dissolution of said corporation as set forth in the foregoing resolution is authorized by law.

Given under my hand and the Great Seal of the said State, at the City of Charleston, this Fourth day of April, 1928.

[STATE SEAL.] GEORGE W. SHARP,
Secretary of State.

STATE OF WEST VIRGINIA:

Nicholas County Court Clerk's Office.

April 5, 1928.

This Writing was this day presented in said office, and thereupon, is admitted to record.

Teste:

C. E. STEPHENSON,
Clerk.

STATE OF WEST VIRGINIA,
County of Nicholas, To wit:

I, C. E. Stephenson, Clerk of the County Court of the County of Nicholas, do certify that the foregoing is a true copy of a Certificate of record in my said office in Deed Book No. 79, at page 344.

Given under my hand this the 27th day of May, 1932.

Teste:

(Signed) C. E. STEPHENSON,
Clerk Nicholas County Court.

17 EXHIBIT B.

Certified Copy of Deed by and Between the Birch Valley Lumber Company, a Corporation, and J. C. Campbell, R. M. Campbell, J. R. Campbell, C. W. Amsler, and Henry Amsler, Partners, Trading as the Birch Valley Lumber Company, Described in Paragraph III.

18 This deed, made this 1st day of January, 1928, by and between The Birch Valley Lumber Company, a Corporation, party of the first part, and J. C. Campbell, R. M. Campbell, J. R. Campbell, C. W. Amsler and Henry Amsler, partners, trading as The Birch Valley Lumber Company, parties of the second part.

Whereas, Said party of the first part, at a general meeting of the stockholders of said corporation held on the 29th day of November, 1927, upon due and regular call and notice to all of the stockholders thereof, at least 60% of the capital stock of said Corporation being represented and voting, unanimously passed the following resolutions, to-wit:

"Resolved: That the Birch Valley Lumber Company, a Corporation, do discontinue the business of said corporation as of January 1st, 1928, and in accordance with section 56, chapter 53, of the Code, and that proper action be taken to pay all debts and liabilities of said corporation or provide for the payment thereof, and for the division of property and assets amongst the stockholders.

Resolved: That the individual stockholders of this corporation form a partnership to continue the operation of the same business now carried on by the said corporation, and that in lieu of dividing the property and assets of said corporation that may remain after paying all debts and liabilities of the corporation, that said corporation do deliver to said stockholders when said partnership shall have been perfected, all the property and assets of said corporation in consideration of and upon condition that said partnership so formed by said stockholders shall assume the payment of and pay all debts and liabilities of said corporation and save said corporation harmless therefrom. Said transfer to take effect as of January 1, 1928, and not to include or interfere with any dividends which may be declared and paid

19 on the capital stock of said corporation prior to its final dissolution on January 1, 1928, and the transfer of the remaining assets as of that date, and be it further resolved that the directors of said corporation authorize the execution of all proper writing necessary to effectuate said transfer and do everything else necessary to put same into effect''; and,

Whereas, Pursuant thereto said parties of the second part formed a partnership to continue the operation of the same business formerly carried on by said corporation, party of the first part herein, as shown by Articles of Agreement of Partnership, in writing, dated the 31st day of December, 1927, duly executed and an executed copy of which Articles of Agreement was submitted to said corporation, inspected and found to comply with said resolutions in all respects, and is here referred to for a more particular recital of the contents thereof; and,

Whereas, The board of directors of said corporation, party of the first part herein, at a meeting regularly held on the 10th day of December, 1927, gave due authority to the proper officers of said corporation to execute all papers necessary in the premises; and,

Whereas, It is the desire of said corporation, party of the first part herein, to comply with said resolutions of the stockholders thereof, and proceedings of the directors thereof, and to transfer all of the property and assets of said corporation to said parties of the second part, members of said partnership, and all of the stockholders of record of said corporation at the date of the dissolution thereof:

20 Now, therefore, this deed witnesseth: That for and in consideration of one dollar ($1.00), cash in hand paid, and in further consideration of the premises, and in still further consideration that said parties of the second part shall assume the payment of and pay all debts and liabilities of said corporation, and save said corporation harmless therefrom, and in still further consideration that said parties of the second part accept this deed as settlement in full of their share of the assets of said corporation, as stockholders thereof, in the same proportion as each of said parties of the second part heretofore owned and held stock in said corporation, and in still further con-

sideration that said parties of the second part have this day surrendered to said corporation for cancellation all capital stock therein held by each, respectively, said party of the first part doth hereby grant, by deed, unto said parties of the second part, in such proportion as the interest of each appeared in said corporation by the capital stock held by each, and which is in the same proportion as the interest of each appears in said articles of Agreement of Partnership, heretofore referred to, all the property and assets of said The Birch Valley Lumber Company, a corporation, party of the first part herein, both tangible and intangible, real, personal or mixed, wherever situate, same consisting mostly of standing timber and other real estate, all in Nicholas and Webster Counties, West Virginia, some of which is vested in said corporation by legal title and other of which, said corporation is vested with equitable title, or other rights under contracts; leases and leasehold estates in real estate and improvements thereon, and
21 in other property; a certain saw-mill, equipment and appurtenances, located in and near the Town of Tioga, in said Nicholas County; railroads, railroad equipment and rolling stock from points near said Town of Tioga into the woods; accounts and notes receivable; choses in action; money; lumber on hand and in transit, including logs cut in the woods, in transit or in process of manufacture, and all timber products; investments in other corporations and other businesses, and each and every other kind or form of property owned by said corporation, or to which it is entitled, or in which it has any interest, legal, equitable or otherwise, it being the intention of this deed to transfer and convey unto said parties of the second part all the assets and property of said party of the first part, whether specifically named herein or not, and it is the further intention of this instrument that the assets and property of said corporation shall not be limited by the specific recitals hereof but shall include every form of property or assets of said corporation, whether specifically herein referred to or not.

And said parties of the second part accept this deed as a full compliance on the part of said party of the first part in carrying out the resolutions hereinbefore referred to, and in distributing the assets to the stockholders thereof, parties of the second part herein.

In testimony whereof said party of the first part has caused this instrument to be executed in its corporate name by J. C. Campbell, its President, thereunto duly authorized, and under the corporate seal of said corporation, duly attested by J. R. Campbell, its Secretary, also duly authorized, all on the day and year first above written.

[CORPORATE SEAL.] THE BIRCH VALLEY LUMBER CO.,
By J. C. CAMPBELL,
President.

Attest:
J. R. CAMPBELL,
Secretary.

STATE OF WEST VIRGINIA,
County of Nicholas, To wit:

I, Paul McNeill, a Notary Public in and for said county and state, do certify that J. C. Campbell, who signed the writing above for The Birch Valley Lumber Company, a corporation, bearing date the 1st day of January, 1928, has this day in my said county, before me, acknowledged the said writing to be the act and deed of said corporation.

Given under my hand this 1st day of June, 1932.

[NOTARIAL SEAL.] PAUL McNEILL,
Notary Public.

My commission expires Aug. 10, 1936.

STATE OF WEST VIRGINIA:

Nicholas County Court Clerk's Office.

June 1, 1932.

This Deed was this day presented in said office, and thereupon, together with the certificate thereto annexed, is admitted to record.

Teste:

C. E. STEPHENSON,
Clerk.

STATE OF WEST VIRGINIA,
County of Nicholas, To wit:

I, C. E. Stephenson, Clerk of the County Court of the County aforesaid, do certify that the foregoing is a true

copy of a deed from The Birch Valley Lbr. Co. to J. C. Campbell et al., of record in said Clerk's Office in Deed Book 85 page 131.

Given under my hand this 1st day of June, 1932.

C. E. STEPHENSON,
Clerk County Court.

23 EXHIBIT C.

Copy of Complaint Filed with the Interstate Commerce Commission Against Strouds Creek and Muddlety Railroad Company, the Baltimore and Ohio Railroad Company, et al., Described in Paragraph XII.

24 Before the Interstate Commerce Commission.

No. 19191.

THE BIRCH VALLEY LUMBER COMPANY

vs.

STROUDS CREEK AND MUDDLETY RAILROAD COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, et al.

Complaint.

The complaint of the above-named complainant respectfully shows:

I. That The Birch Valley Lumber Company, a corporation organized and existing under the laws of the State of West Virginia, is engaged in the manufacture and sale of lumber and other forest products, with its principal office and place of business at Tioga, West Virginia.

II. That the defendants named in list of defendant carriers on pages 6 to 9, are common carriers engaged in the transportation of persons and property, wholly by railroad, or partly by railroad and partly by water, between points in the State of West Virginia and points within the United States and Dominion of Canada, and as such common carriers are subject to the provisions of the Interstate Commerce Act.

III. That the mill of the complainant is located on the railway of the Strouds Creek and Muddlety Railroad Company, a common carrier corporation subject to the provisions of the Interstate Commerce Act, extending from Delphi, West Va. to Allingdale, West Va., a distance of approximately ten miles and connecting with the Baltimore and Ohio Railroad at the latter point.

IV. That complainant in the regular course of business ships lumber and other forest products via through routes established by defendant carriers from Tioga, W. Va., to various destinations in the United States and eastern Canada, including eastern Trunk Line, New England and Central Freight Association territories, the following points being typical and representative of said destinations:

Cincinnati, O.	Albany, N. Y.
Chicago, Ill.	Buffalo, N. Y.
Cleveland, O.	New York, N. Y.
Detroit, Mich.	Pittsburgh, Pa.
Grand Rapids, Mich.	Philadelphia, Pa.
Toledo, O.	Baltimore, Md.
Montreal, Quebec.	Boston, Mass.

V. That defendants have established through routes for the transportation of lumber and other forest products from Tioga, W. Va., to destinations referred to in Paragraph IV, but have published no joint rates applicable to the through transportation of lumber and other forest products via such established through routes. That in the absence of such joint rates complainant's traffic, though moving via established through routes from Tioga, W. Va., to destinations referred to in Paragraph IV, is and must be transported at the separately established rates of defendant carriers applicable to the through transportation, to-wit, $15 per car from Tioga, W. Va., to Allingdale, W. Va., as published in current Strouds Creek and Muddlety Railroad tariff, I. C. C. No. 3, and prior issues and the lawful rates applicable from Allingdale, W. Va., to the destination territory referred to in Paragraph IV, as published in current Baltimore and Ohio Railroad tariff, I. C. C. No. 19710 and 20785, and prior issues.

VI. That lumber and other forest products milled by complainant at or near Tioga, W. Va., and shipped via the

Strouds Creek and Muddlety Railroad and its connections come in direct competition in the territory referred to in paragraph IV, with lumber and other forest products milled at or near and shipped from points on The Baltimore and Ohio Railroad, West Virginia Northern Railroad, Cumberland and Pennsylvania Railroad and Western Maryland Railway; the following points being typical and representative shipping points at or near which the mills of complainant's competitors are situate, to-wit:

Points on the Baltimore and Ohio Railroad:

Richwood, W. Va.	Centralia, W. Va.
Gauley Mills, W. Va.	Pickens, W. Va.
Curtin, W. Va.	Sunerest, W. Va.
Arcola, W. Va.	Midvale, W. Va.

Points on the West Virginia Northern Railroad:

Marion, W. Va.	Mattingly, W. Va.
Jessop, W. Va.	Snider, W. Va.
Howesville, W. Va.	Kingwood, W. Va.

27 Points on the Cumberland and Pennsylvania, R. R.:

Hoffman, Md.	Midlothian, Md.
State Line, Pa.	Lord, Md.
Frostburg, Md.	Westernport, Md.

Points on the Western Maryland Railway:

Frostburg, Md.	Coromandel, Md.
State Line, Pa.	Koontz, Md.
Midland, Md.	New Detmold, Md.

VII. That complainant's competitors shipping lumber and other forest products from points on The Baltimore and Ohio Railroad, West Virginia Northern Railroad, Cumberland and Pennsylvania Railroad and Western Maryland Railway, are and have been accorded by The Baltimore and Ohio Railroad Company and other defendant carriers rates lower by at least $15 per car to destinations referred to in Paragraph IV than are and have been accorded complainants for substantially similar service.

VIII. That by reason of the facts stated in the foregoing paragraphs, complainant is now and has been for more than three years past subjected to the payment of rates and charges for the transportation of lumber and other forest products, which were when exacted and still are unjust and unreasonable in violation of Section 1 of the Interstate Commerce Act, and unreasonable in relation to the rates charged their competitors for substantially similar service to the undue prejudice of complainant and undue preference of complainant's competitors, referred to in Paragraph VI, in violation of Section 3 of the Interstate Commerce Act. That complainant has been injured thereby to its damage.

28 Wherefore complainant prays that defendants may be severally required to answer the charges herein; that after due hearing and investigation an order be made commanding said defendants and each of them to cease and desist from the aforesaid violations of said Act and establish and put in force and apply in future to the transportation of lumber and other forest products from Tioga, W. Va., to points in the destination territory named in Paragraph IV hereof, in lieu of rates named in Paragraph V, joint rates not exceeding in amount the rates to the destinations referred to in Paragraph IV applicable from Allingdale, W. Va., or such other rates as the Commission may deem reasonable and just, and also pay to complainant by way of reparation for the unlawful charges hereinbefore alleged such sums as in view of the evidence to be adduced herein, the Commission shall determine that complainant is entitled to as an award of damages under the provisions of said Act for violation thereof and that such other and further order or orders be made as the Commission may consider proper in the premises.

Dated at Tioga, W. Va., December 20, 1926.

The Birch Valley Lumber Company.
J. C. CAMPBELL,
Its President.

OBERG & GILILLAND,
Mills Building,
Washington, D. C.,
For Complainant.

29 The Akron, Canton & Youngstown Railway Company,
Alton & Eastern Railroad Company,
The Ann Arbor Railroad Company,
The Atchison, Topeka and Santa Fe Railway Company,
Atlantic City Railroad Company,
Atlantic Coast Line Railroad Company,
The Baltimore and Ohio Railroad Company,
The Baltimore and Ohio Chicago Terminal Railroad Company,
Bath and Hammondsport Railroad Company,
The Belt Railway Company of Chicago,
Bessemer and Lake Erie Railroad Company,
The Bloomsburg and Sullivan Railroad Company,
Boston and Albany Railroad,
(The New York Central Railroad Company, Lessee).
Boston and Maine Railroad,
Boyne City, Gaylord and Alpena Railroad Company,
Buffalo & Susquehanna Railroad Corporation,
Buffalo, Rochester and Pittsburgh Railway Company,
Bush Terminal Railroad Company,
Canadian Pacific Railway Company,
Central Indiana Railway Company,
Central New England Railway Company,
The Central Railroad Company of New Jersey,
Central Vermont Railway Company,
Central West Virginia & Southern Railroad Company,
Chestnut Ridge Railway Company,
The Chicago and Alton Railway Company,
(William W. Wheelock and William G. Bierd, Receivers).
Chicago and Eastern Illinois Railway Company,
Chicago and Erie Railroad Company,
Chicago & Illinois Midland Railway Company,
Chicago and North Western Railway Company,
Chicago, Burlington & Quincy Railroad Company,
Chicago Great Western Railroad Company,
Chicago, Indianapolis and Louisville Railway Company,
Chicago, Kalamazoo and Saginaw Railway Company,
Chicago, Milwaukee and Gary Railway Company,
Chicago, Milwaukee and St. Paul Railway Company,
(H. E. Bryan, Mark W. Potter and Edward J. Brundage, Receivers).

Chicago, North Shore and Milwaukee Railroad Company,
Chicago, Peoria and St. Louis Railroad Company,
(William Cotter, Receiver).
The Chicago, Rock Island and Pacific Railway Company,
The Cincinnati, Indianapolis & Western Railroad Company,
The Cincinnati Northern Railroad Company,
The Cleveland, Cincinnati, Chicago and St. Louis Railway Company,
Clinton, Davenport & Muscatine Railway Company,
Cumberland and Pennsylvania Railroad Company,
Dayton and Union Railroad Company,
The Delaware and Hudson Company,
The Delaware, Lackawanna and Western Railroad Company,
Detroit and Mackinac Railway Company,
The Detroit and Toledo Shore Line Railroad Company,
Detroit, Toledo and Ironton Railroad Company,
East Jersey Railroad and Terminal Company,
East St. Louis Connecting Railway Company,
Elgin, Joliet and Eastern Railway Company,
Erie & Michigan Railway & Navigation Co.,
Erie Railroad Company,
Evansville, Indianapolis & Terre Haute Railway Company,
30 The Gettysburg and Harrisburg Railway Company,
Goodrich Transit Company,
Grand Trunk Railway System,
(Lines West of Detroit and St. Clair Rivers), comprising the following carriers:
The Chicago, Detroit and Canada Grand Trunk Junction Railroad Company,
(Canadian National Railway Company, Lessee).
Cincinnati, Saginaw and Mackinaw Rail Road Company,
(Canadian National Railway Company, Lessee).
Detroit, Grand Haven and Milwaukee Railway Company,
Grand Trunk-Milwaukee Car Ferry Company,
Grand Trunk Western Railway Company,
The Michigan Air Line Railway,
Toledo, Saginaw and Muskegon Railway Company,

Illinois Central Railroad Company,
Illinois Terminal Company,
Illinois Traction System,
comprising the following carriers:
Illinois Traction, Inc.
St. Louis Electric Terminal Railway Company.
Indiana Harbor Belt Railroad Company,
Indian Creek Valley Railway Company,
The Ironton Railroad Company,
(Lehigh Valley Railroad Company, Reading Company, Lessees).
Jamestown, Westfield and Northwestern Railroad Company,
The Kansas and Sidell Railroad Company,
Lackawanna and Wyoming Valley Railroad Company,
The Lehigh and Hudson River Railway Company,
Lehigh and New England Railroad Company,
Lehigh Valley Railroad Company,
The Lima & Defiance Railroad Company,
Litchfield and Madison Railway Company,
The Long Island Rail Road Company,
The Lorain & West Virginia Railway Company,
Louisville and Nashville Railroad Company,
Louisville, Henderson & St. Louis Railway Company,
Manistee and North-Eastern Railroad Company,
(The Michigan Trust Company, Receiver).
Maryland and Pennsylvania Railroad Company,
The Michigan Central Railroad Company,
Michigan Railroad Company,
(John F. Collins, Receiver).
Middletown and Unionville Railroad Company,
The Minneapolis & St. Louis Railroad Company,
(W. H. Bremner, Receiver).
Minneapolis, St. Paul & Sault Ste. Marie Railway Company,
Missouri Pacific Railroad Company,
Mobile and Ohio Railroad Company,
The Monongahela Railway Company,
Montour Railroad Company,
Moshassuck Valley Railroad Company,
The Nashville, Chattanooga & St. Louis Railway,
The New York and Long Branch Railroad Company,
New York and Pennsylvania Railway Company,

The New Jersey and New York Railroad Company,
New Jersey, Indiana & Illinois Railroad Company,
The New York Central Railroad Company,
The New York, Chicago and St. Louis Railroad Company,
New York Dock Railway,
The New York, New Haven and Hartford Railroad Company,
New York, Ontario and Western Railway Company,
31 New York, Susquehanna and Western Railroad Company,
Norfolk and Western Railway Company,
The Northern Ohio Railway Company,
The Ohio Public Service Company,
Paducah & Illinois Railroad Company,
The Pennsylvania Railroad Company,
Peoria and Pekin Union Railway Company,
Peoria Railway Terminal Company,
(H. I. Battles, Receiver).
Pere Marquette Railway Company,
The Pittsburgh and Lake Erie Railroad Company,
The Pittsburg & Shawmut Railroad Company,
The Pittsburgh & West Virginia Railway Company,
Pittsburgh, Chartiers & Youghiogheny Railway Company,
The Pittsburgh, Lisbon & Western Railroad Company,
The Pittsburg, Shawmut & Northern Railroad Company,
(John D. Dickson, Receiver).
The Pontiac, Oxford and Northern Railroad Company,
Quebec Central Railway Company,
Rahway Valley Company,
(Rahway Valley Company, Lessee).
Raritan River Rail Road Company,
Reading Company,
Reynoldsville and Falls Creek Railroad Company,
Richmond, Fredericksburg and Potomac Railroad Company,
Rock Island Southern Railway Co.,
Rutland Railroad Company,
St. Louis and Hannibal Railroad Company,
St. Louis Merchants Bridge Terminal Railway Company,
The St. Louis Transfer Railway Company,

The St. Louis, Troy and Eastern Rail Road Company,
Seaboard Air Line Railway Company,
The Sharpsville Railroad Company,
(G. M. McIlvain, Receiver).
South Brooklyn Railway Company,
Southern Railway Company,
The Staten Island Rapid Transit Railway Company,
Strouds Creek and Muddlety Railroad Company,
Terminal Railroad Association of St. Louis,
Toledo, Peoria & Western Railway Company,
(Samuel M. Russell, Receiver).
United Electric Railways Company,
The Virginian Railway Company,
The Virginia Railway Company,
The Wabash, Chester and Western Rail Road Company,
(J. Fred Gilster, Receiver).
Wabash Railway Company,
Western Allegheny Railroad Company,
Western Maryland Railway Company,
The Westfield Railroad Company,
West Jersey and Seashore Railroad Company,
West Shore Railroad,
(The New York Central Railroad Company, Lessee).
West Side Belt Railroad Company,
West Virginia Northern Railroad Company,
Wharton and Northern Railroad Company,
The Wheeling and Lake Erie Railway Company,
The Wiggins Ferry Company,
The Wilkes-Barre and Eastern Railroad Company,
Williamsport & North Branch Railway Co.,
The Williams Valley Railroad Company,
The Winfield Railroad Company, and
The Youngstown & Ohio River Railroad Company.

32 EXHIBIT D.

Answer of the Strouds Creek and Muddlety Railroad, Described in Paragraph XV.

33 Before the Interstate Commerce Commission.

Docket No. 19191.

THE BIRCH VALLEY LUMBER CO., Complainant,

vs.

STROUDS CREEK AND MUDDLETY RAILROAD COMPANY, Defendant.

Answer of Defendant Strouds Creek and Muddlety Railroad Company.

The respondent, Strouds Creek and Muddlety Railroad Company for answer to complaint in this proceeding respectfully states:

I. That it admits the allegations of this paragraph.

II. That it admits the allegations of this paragraph.

III. That it admits the allegations of this paragraph.

IV. That it admits the allegations of this paragraph.

V. That it admits the allegations of this paragraph.

VI. That for lack of information it is unable to either admit or deny the allegations of this paragraph.

34 VII. That it believes the allegations of this paragraph to be substantially correct.

VIII. That it admits the allegations of this paragraph.

Wherefore defendant believing that complainants are entitled to the district rates on lumber from mills located on the line of its railway, is willing to grant such rates with the concurrence of the Baltimore & Ohio Railway Company and its connecting carriers and will accept a reasonable division of such rates for the transportation service over its line of railway from the mills of Allingdale, West Virginia, the junction point with the Baltimore & Ohio Railway Company. Defendant is not prepared to admit that the existing rates have damaged complainants and calls for proof thereof.

Dated at Tioga, West Virginia, March 10, 1927.

STROUDS CREEK & MUDDLETY RAILROAD COMPANY.

A. R. YARBOROUGH,

Traffic Manager.

35 EXHIBIT E.

Answer Filed by The Baltimore and Ohio Railroad Company et al., Described in Paragraph XVI.

36 Before the Interstate Commerce Commission.

Docket No. 19191.

THE BIRCH VALLEY LUMBER COMPANY, Complainant,

v.

STROUDS CREEK AND MUDDLETY RAILROAD COMPANY et al., Defendants.

Answer of The Baltimore and Ohio Railroad Company, The Baltimore and Ohio Chicago Terminal Railroad Company, The Cincinnati, Indianapolis and Western Railroad Company, Dayton and Union Railroad Company, The Staten Island Rapid Transit Railroad Company.

I. These defendants admit the allegations contained in Paragraph I of the complaint.

II. Answering the allegations contained in Paragraph II of the complaint, these defendants admit that they are common carriers, and that, as such, they are subject to the provisions of the Interstate Commerce Act, and the acts amendatory thereof and supplementary thereto.

III. These defendants admit the allegations contained in Paragraph III of the complaint.

IV. Answering the allegations contained in Paragraph IV of the complaint, these defendants state that they are not advised with respect thereto, and, therefore, can neither admit nor deny such allegations, but ask for due proof thereof.

V. Answering the allegations contained in Paragraph V of the complaint, these defendants beg leave to refer to tariffs lawfully filed with the Commission for a correct statement of the rates mentioned therein.

37 VI. Answering the allegations contained in Paragraph VI of the complaint, these defendants state that they are not advised with respect thereto, and, therefore, can neither admit nor deny such allegations, but ask for due proof thereof.

VII. These defendants deny each and every allegation contained in Paragraphs VII and VIII of the complaint.

Wherefore, having answered fully, these defendants ask that the complaint herein be dismissed.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
By ARCHIBALD FRIES,
Vice-President,
THE BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD COMPANY,
THE CINCINNATI, INDIANAPOLIS AND WESTERN RAILROAD COMPANY,
DAYTON AND UNION RAILROAD COMPANY,
THE STATEN ISLAND RAPID TRANSIT RAILROAD COMPANY,
By HERBERT S. HARR,
H. D. SHEEAN,
Their Attorneys.

H. S. HARR,
H. D. SHEEAN,
CHARLES R. WEBBER,
Attorneys for Defendants.

38 EXHIBIT F.

Report of the Interstate Commerce Commission, Described in Paragraph XIX.

39 No. 19191.

BIRCH VALLEY LUMBER COMPANY

v.

STROUDS CREEK & MUDDLETY RAILROAD COMPANY et al.

Submitted November 23, 1927. Decided May 29, 1928.

Rates on lumber, in carloads, from Tioga and Delphi, W. Va., to interstate destinations in Canada, trunk-line, New England, and central territories found not unreasonable but unduly prejudicial. Nonprejudicial rates prescribed for the future.

Oberg & Gilliland and *R. M. Gilliland* for complainant and intervener.

A. R. Yarborough for Strouds Creek & Muddlety Railroad; *Charles R. Webber* and *Elmer L. Beach* for Baltimore & Ohio Railroad and associated lines, defendants.

Report of the Commission.

Division 3, Commissioners Esch, Taylor, and Brainerd.

By DIVISION 3:

Exceptions were filed by all parties to the report proposed by the examiner and oral argument had.

Complainant, a corporation, by complaint filed January 11, 1927, alleges that the rates charged on lumber, in carloads, from Tioga, W. Va., to interstate destinations in Canada, eastern trunk-line, New England, and central territories were and are unreasonable and unduly preferential and prejudicial. Reasonable rates for the future and reparation are sought. At the hearing the Delphi Lumber Company intervened in support of the complainant. Rates are published to the destinations considered in amounts per car, per 100 pounds, and per ton of 2,000 pounds. For convenience, rates will be stated in cents per 100 pounds.

The Strouds Creek & Muddlety, hereinafter referred to by its initials, answered the complaint and expressed its willingness to grant the relief sought by complainant for the future but denies that complainant has been damaged by the existing rates.

Complainant is interested in the establishment of through routes and joint rates not to exceed the district basis. Through routes are available but not joint through rates. It asserts that by reason of competition it is forced to absorb the charge of the S. C. & M. and by reason thereof it can not compete on as favorable terms as its competitors. Complainant's prices are all quoted f. o. b. Allingdale, W. Va. Its markets are various points in Canada, Kentucky, Illinois, Michigan, Ohio, Pennsylvania, New York, New Jersey, Maryland, and the New England States. During the last six months of 1926 a total of 565 cars moved from points on the S. C. & M. to various destinations. The average load was 52,160 pounds per car. Of these, 197 cars were destined to points in Pennsylvania, 128 to West Virginia, 86 to Ohio, 71 to Kentucky, and 26 to New York. The remainder were shipped to various other states. The traf-

fic originating on the S. C. & M. is largely coal and forest products. The former constitutes approximately 50 per cent and the latter 45 per cent of the originated tonnage. The Baltimore & Ohio assumed the burden of defense. It will be referred to herein as the B. & O.

40 Complainant's mill is located on the S. C. & M. at Tioga and that of intervener at Delphi, W. Va. These points are 7.1 and 9.5 miles, respectively, from the connection of that line and the B. & O. at Allingdale. On shipments of lumber the S. C. & M. charges $15 per car for its service to the junction point, which is in addition to the rate from the junction point. The charge of the S. C. & M. is prepaid by the shippers. Complainant manufactures approximately 65,000 feet of lumber per day, and there is about 200,000,000 feet still standing and available to the mill. The lumber is sold in competition with that produced throughout the country and especially that produced in the same general territory.

The principal competitors are said to be mills at Gauley Mills, Fenwick, Midvale, Sunerest, and Pickens, W. Va., which produce and manufacture the same grades of lumber as complainant and are located in the same general territory. These points are all on the line of the B. & O., and the district or group rates apply therefrom.

For rate-making purposes the producing territory tributary to the B. & O. in Pennsylvania, Maryland, and West Virginia is divided into several groups. On traffic to trunk-line territory Allingdale is located in what is called the Richwood group. This group embraces the territory from the first station south of Clarksburg, W. Va., on the north to and including Richwood, W. Va., on the south, Jarretts Ford, W. Va., on the west, and Carrollton and Conley, W. Va., on the east. The group is quite extensive. From points therein the Richwood group rate is applied from all stations on the main or branch lines of defendant but not from points on short-line connections. The rates from such latter points are made on a combination of the locals to junction points plus the district or group rate beyond. The length of the branch lines of the B. & O. from points on which the junction-point or district rate is applicable range from 1.1 to 47.9 miles.

On traffic destined to central territory Allingdale is located in Group 9. This group embraces the line from

Clarksburg south to Richwood and includes the line from Weston, W. Va., to Pickens, W. Va., through Buckhannon and Sago, W. Va. The rates from points in this group are established in the same manner as those on traffic to trunk-line territory, that is, the district or group rate applies only from points on the B. & O., the rates from other points being combination of the local rate to the junction plus the district rate beyond.

Complainant compares the rates assailed and the earnings per car afforded with those from various points taking the group or district rates in the same general territory to representative destinations in central and trunk-line territories. These comparisons are illustrated in the appendix hereto.

In the appendix the stations shown from Allingdale to and including Midvale, W. Va., are points on the B. & O.; those from Marion to Kingwood, W. Va., are on the West Virginia Northern; those from Hoffman to State Line, Md., on the Cumberland & Pennsylvania; and those from Frostburg, Md., to State Line on the Western Maryland. The B. & O. is a party to all the rates shown. Those applying from points on lines other than the B. & O. are on the same basis as those applicable from the junction point of those lines with the B. & O. The distances from Westernport, New Detmold, and Kingwood, W. Va., to the point of connection with the B. & O. are 33, 22, and 12.7 miles, respectively, while those from Tioga and Delphi to Allingdale are 7.1 and 9.5 miles, respectively.

A comparison is also made of rates on lumber from the Richwood group and Group 9 on the B. & O. with
41 rates from points in the same general territory for comparable distances to Chicago and New York. With respect to Chicago this comparison shows the group rate is applicable for distances ranging from 576 miles to 761 miles, the average being 632 miles, whereas the distance from Tioga is but 675 miles. To New York the distances for which the blanket rate is applicable range from 509 miles to 665 miles, the average being 557 miles. From Tioga the distance is 603 miles. The inclusion of Tioga and Delphi would increase the average distances from the group but very little and would make no change in the average ton-mile earnings.

The rate policy of the B. & O. is not to extend to points on connecting lines, especially on lumber, the group or junction-point rate except when by competition it is practically compelled to do so. It shows of record numerous short-line connections with which no through rates are in effect. The lines shown are in Virginia, West Virginia, and Pennsylvania. They range in length from 4.5 to 40 miles. It was admitted, however, that joint through rates on lumber are applicable from points on several other short-line connections, the rates being the same as the junction-point or district rate. It is also shown that the B. & O. has through rates on coal applying from points on short-line conections. In fact, such rates apply from points on the S. C. & M. and were established pursuant to the findings in *Tioga Coal Co.* v. *B. & O. R. R. Co.*, 101 I. C. C. 611. Complainant asserts that no sound reason exists for the establishment of the district rates on coal and the refusal to establish such rates on lumber, as both are basic commodities, and competition in the production and sale of each is very keen. In answer thereto the B. & O. asserts that the conditions surrounding the establishment of coal rates are entirely different from those governing the making of rates on lumber. The B. & O. points out that its policy is no different from that of many other carriers in southern and trunk-line territories. It refers to numerous short lines connecting with lines in the South and others connecting with the Pennsylvania in trunk-line territory with which through rates on the basis of the junction-point rate have not been established. It was admitted, however, that while this is true there are also numerous other short-line connections with the same lines shown from which through rates, the same as the rates from the junction point, are in effect.

The B. & O. compares the group rates from Allingdale with those applicable from the various groups surrounding this point. The rates from Allingdale to destinations shown in central territory range from 21.5 to 31.5 cents and produce ton-mile earnings of from 10.3 to 15.5 mills and car-mile earnings ranging from 26.5 to 39.8 cents. Similar rates are in effect from the groups surrounding that within which Allingdale is located. The rates from Allingdale, or the Richwood group in which it is located, are higher than

those from the other groups surrounding it on traffic to trunk-line territory. Defendant B. & O. asserts that these comparisons reflect the reasonableness of the rates from Allingdale. Complainant, however, does not question the reasonableness *per se* of the blanket or group rates from Allingdale or the other points in the group, but assails only what it terms the relatively high through rates from Tioga and Delphi. It also admits that the charge of the S. C. & M. is not unreasonably high.

The B. & O. also compares the rates from Allingdale with those applicable from points on the Chesapeake & Ohio to common destinations. This comparison shows that from Allingdale for distances ranging from 245 to 614 miles the rates vary from 21.5 to 31.5 cents, with ton-mile earnings of from 10.3 to 15.4 mills; that through rates from points on the S. C. & M. to the same destinations range from 23.5 to 34.5 cents; and that from points on the Chesapeake & Ohio, for average distances of from 175 to 478 miles, the rates range from 21.5 to 29.5 cents.

42 The B. & O. refers to the foregoing as showing the reasonableness of the rates assailed. It also shows that sixth-class rates have been found reasonable for application on lumber in trunk-line territory. *Hines Lumber Co.* v. *Director General*, 60 I. C. C. 590, and *White Pine Asso.* v. *Director General*, 81 I. C. C. 401. Further in support of the reasonableness of the present rates and its policy the B. & O. cites the case of *Peytona Lumber Co.* v. *C. & O. Ry. Co.*, 93 I. C. C. 363, wherein we found the rates on lumber from points on the Guyandotte branch of the Chesapeake & Ohio not unreasonable or unduly prejudicial.

In *Indian Creek Valley Lumber Co.* v. *B. & O. R. R. Co.*, 126 I. C. C. 161, the rates on lumber and lumber products from points in Pennsylvania on the Indian Creek Valley Railroad to interstate destinations in trunk-line and central territories were found unreasonable and unduly prejudicial to the extent they exceeded the group basis. The facts in that case are very similar to those in this. The B. & O., however, raises a contention with respect to the ownership and management of the S. C. & M., it being its position that the S. C. & M. is controlled and operated by complainant herein. While this may be true, intervener

operating the mill at Delphi has no connection whatsoever with the S. C. & M. However, the S. C. & M. differs from the Indian Creek Valley in that the latter is controlled by the B. & O.

The leading case on the issues here before us is *Swift Lumber Co.* v. *F. & G. R. R. Co.*, 61 I. C. C. 485. In that case, complainant's mill was located at Knoxo, Miss., on the Fernwood & Gulf, 27 miles from its junction with the Illinois Central. The rates on lumber were blanketed from all points on the main and branch lines of the Illinois Central and other trunk lines in the surrounding territory. The rates from points on the Fernwood & Gulf were based on arbitraries over the group rates, except to destinations in Tennessee, where the full combination on the junction point applied. The Illinois Central did not extend the group rates to points on any of its short-line connections in this territory, but it participated in joint rates from points on three or four short lines which connected with other trunk lines. Knoxo was well within the blanketed territory, it being pointed out that the distances over the short routes were from 26 to 71 miles less than from various other points in the group. We found that the rates assailed were not unreasonable, except to points in Tennessee, but were unduly prejudicial to the extent that they exceeded the blanket basis. The following, quoted from pages 490 and 491 of our report, is equally applicable here:

"The fundamental issue is whether carriers which have equalized rates on lumber to certain destinations from all their main-line and branch-line points, and from points on certain independent short lines as well, which are located within a producing territory of wide extent may, without being guilty of undue prejudice, refuse to extend similar blanket rates to producing points within such territory which are located on other independent short lines. * * *

Clearly cost of service furnishes no justification for such refusal, for the haul from Knoxo is shorter than the hauls from numerous other points to which the blanket rates apply, and there is no evidence that it is attended by unusual transportation difficulties. As compared with a single-line haul, some slight additional cost is doubtless involved in the separate corporate organization of the Fernwood & Gulf and in its separate billing and accounting expense,

but the blanket rates are not now confined to single-line hauls, but apply in many instances to multiple-line routes. Nor will competition serve as a justification, for the blanket rates apply not only at junction points where competition exists, but as well at all local points on both the main
43 lines and branch lines of defendants.

* * * Perhaps the most important suggestion is that if the blanket rates are extended to Knoxo it will follow as a necessary consequence that they must be extended to all similar points on other independent short lines, and that the revenues of the trunk lines will thereby be reduced materially. But the protection of revenue goes primarily to the issue of reasonableness and is not sufficient justification for a prejudicial rate adjustment. In the yellow-pine territory west of the Mississippi similar blanket rates have been uniformly extended to all points."

The facts of this case are very similar to those in the *Swift Lumber Co. case.* The S. C. & M. appears to be well within the blanket territory here as was the Fernwood & Gulf in that case. For example, the distances from Tioga are 63 and 86 miles less than from the most distant points taking the group rates on traffic to New York and Chicago, respectively. In that case as here it was the policy of the principal trunk-line defendant to not extend the junction-point or group rates to points on short-line connections. The Illinois Central system had eight such connections, and none of them were accorded the blanket rates. Here also the B. & O. has not extended the group rates to points on other short lines in the same group, but in other near-by groups taking slightly lower rates the junction-point or group rates are applied from points on certain short lines and a trunk-line connection of the B. & O. The latter contends that this is due to competition, although it is the only carrier which connects with one of the short lines. A similar contention was made by the Illinois Central with respect to its participation in joint rates from points on certain short-line connections of other carriers. The Swift Lumber Company's competition in that case was not shown to be with any particular mills and was not confined to those in the blanket territory. In the present case complainant's competition is mainly with mills in the same general territory, which includes the other groups where the

junction-point or group rates apply from points on certain short-line connections of the B. & O. As in the case cited, mills on the other short lines are not shown to fix the prices at which complainant sells its lumber, but there appears to be no question that complainant and intervener are forced to base their prices on the group rates and absorb the charges of the S. C. & M.

Our decision in the *Swift Lumber Co. case* was sustained by the Supreme Court in *United States* v. *Illinois Cent. R. R.*, 263 U. S. 515. The court said that the decision was supported by ample evidence. Since then we have generally followed that decision in many cases. In some of them we have required the application of the group rates under section 3 findings only, and in other cases by findings under both section- 1 and 3. They include cases where the complainant owned and controlled the short line. In no case have we failed to find undue prejudice and preference where the rates assailed on lumber were the full combination of the group rates plus the local rates on the branch or short line. No reason appears for reaching a different conclusion in this case.

We find that the rates assailed, in so far as they apply within the United States, were not and are not unreasonable but were, are, and for the future will be unduly prejudicial to complainant and unduly preferential of its competitors in the same general origin territory to the extent that they exceeded, exceed, or may exceed the rates contemporaneously maintained on like traffic from the group which includes Allingdale, W. Va. The record will not support an award of reparation based on the undue prejudice found to exist.

44 An appropriate order will be entered.

BRAINERD, *Commissioner*, dissenting:

No sufficient basis is laid in the majority's report for a finding of undue prejudice. The rates assailed from Tioga and Delphi, on the S. C. & M., which is found by the majority unduly prejudicial to the extent that it exceeds the rate from Allingdale and other points in the same district taking the junction point rate, can not be held illegal unless it is shown that the difference in the rates is not justified by the cost of the respective services, by their values, or by

Rates assailed and earnings per car compared with those from points taking group or district rates.

From—	To Baltimore, Md.			To Philadelphia, Pa.			To New York, N.Y.		
	Distance	Rate[1]	Earnings[2]	Distance	Rate[1]	Earnings[2]	Distance	Rate[1]	Earnings[2]
	Miles	Cents		Miles	Cents		Miles	Cents	
Tioga, W. Va.	414	29.38	$153.22	512	31.38	$163.66	603	34.38	$179.30
Allingdale, W. Va.	404	26.5	138.22	502	28.5	148.66	593	31.5	164.30
Richwood, W. Va.	422	.....	.....	520	.....	.....	611	.....	.....
Gauley Mills, W. Va.	402	.....	.....	500	.....	.....	591	.....	.....
Curtin, W. Va.	412	.....	.....	510	.....	.....	601	.....	.....
Arcola, W. Va.	380	.....	.....	487	.....	.....	578	.....	.....
Centralia, W. Va.	375	.....	.....	473	.....	.....	564	.....	.....
Pickens, W. Va.	359	.....	.....	457	.....	.....	548	.....	.....
Suncrest, W. Va.	355	.....	.....	453	.....	.....	544	.....	.....
Midvale, W. Va.	339	.....	.....	437	.....	.....	528	.....	.....
Marion, W. Va.	178	23	119.97	276	26.5	138.22	367	28.5	148.66
Jessop, W. Va.	180	.....	.....	278	.....	.....	369	.....	.....
Hawesville, W. Va.	182	.....	.....	280	.....	.....	371	.....	.....
Mattingly, W. Va.	183	.....	.....	281	.....	.....	372	.....	.....
Snider, W. Va.	186	.....	.....	284	.....	.....	375	.....	.....
Kingwood, W. Va.	188	.....	.....	286	.....	.....	377	.....	.....
Hoffman, Md.	189	18.5	96.50	287	21.5	112.14	378	25	130.40
Frostburg, Md.	194	.....	.....	292	.....	.....	383	.....	.....
Midlothian, Md.	197	.....	.....	295	.....	.....	386	.....	.....
Lord, Md.	201	.....	.....	299	.....	.....	390	.....	.....
Westernport, Md.	210	.....	.....	308	.....	.....	399	.....	.....
State Line, Md.	184	.....	.....	282	.....	.....	373	.....	.....
Frostburg, Md.	192	.....	.....	290	22	.....	381	.....	.....
Midland, Md.	192	.....	.....	290	.....	.....	381	.....	.....
Coromandel, Md.	196	.....	.....	294	.....	.....	385	.....	.....
Koontz, Md.	197	.....	.....	295	.....	.....	386	.....	.....
New Detmold, Md.	199	.....	.....	297	.....	.....	388	.....	.....
State Line, Md.	183	.....	.....	281	.....	.....	372	.....	.....

1 Rate reduced to cents per 100 pounds including $15 per car, charge of S. C. & M.
2 Earnings per car based on 52,160 pounds, the average loading of complainant's shipments.

Rates assailed and earnings per car compared with those from points taking group or district rates - Continued

From—	To Albany, N.Y.			To Pittsburgh, Pa.			To Cleveland, Ohio		
	Distance	Rate[1]	Earnings[2]	Distance	Rate[1]	Earnings[2]	Distance	Rate[1]	Earnings[2]
	Miles	Cents		Miles	Cents		Miles	Cents	
Tioga, W. Va.	794	34.38	$179.30	270	21.88	$114.10	394	27.88	$145.40
Allingdale, W. Va.	784	31.5	164.30	260	19	99.10	384	25.00	130.40
Richwood, W. Va.	802	.....	.....	278	.....	.....	402	.....	.....
Gauley Mills, W. Va.	782	.....	.....	259	.....	.....	383	.....	.....
Curtin, W. Va.	792	.....	.....	269	.....	.....	393	.....	.....
Arcola, W. Va.	769	.....	.....	255	.....	.....	370	.....	.....
Centralia, W. Va.	755	.....	.....	241	.....	.....	356	.....	.....
Pickens, W. Va.	739	.....	.....	238	.....	.....	353	.....	.....
Sunoreat, W. Va.	735	.....	.....	235	.....	.....	348	.....	.....
Midvale, W. Va.	719	.....	.....	219	.....	.....	332	.....	.....
Marion, W. Va.	640	31	161.70	167	18.5	96.50	292	23.5	122.56
Jessop, W. Va.	642	.....	.....	169	.....	.....	294	.....	.....
Hawesville, W. Va.	644	.....	.....	171	.....	.....	296	.....	.....
Mattingly, W. Va.	645	.....	.....	172	.....	.....	297	.....	.....
Snider, W. Va.	648	.....	.....	175	.....	.....	300	.....	.....
Kingwood, W. Va.	650	.....	.....	177	.....	.....	302	.....	.....
Hoffman, Md.	568	27.5	143.44	159	.....	.....	...	.....	.....
Frostburg, Md.	573	.....	.....	164	.....	.....	...	.....	.....
Midlothian, Md.	576	.....	.....	166	.....	.....	...	.....	.....
Lord, Md.	580	.....	.....	170	.....	.....	...	.....	.....
Westernport, Md.	589	.....	.....	179	.....	.....	...	.....	.....
State Line, Md.	563	.....	.....	154	.....	.....	...	.....	.....
Frostburg, Md.	571	.....	.....	165	.....	.....	...	.....	.....
Midland, Md.	571	.....	.....	165	.....	.....	304	25	130.40
Coromandel, Md.	575	.....	.....	169	.....	.....	328	.....	.....
Koontz, Md.	576	.....	.....	170	.....	.....	...	.....	.....
New Detmold, Md.	578	.....	.....	172	.....	.....	...	.....	.....
State Line, Md.	562	.....	.....	156	.....	.....	335	.....	.....

1 Rate reduced to cents per 100 pounds including $15 per car, charge of S. C. & M.
2 Earnings per car based on 52,160 pounds, the average loading of complainant's shipments.

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Rates assailed and earnings per car compared with those from points taking group or district rates - continued

From—	To Detroit, Mich.			To Chicago, Ill.			To Cincinnati, Ohio		
	Distance	Rate[1]	Earnings[2]	Distance	Rate[1]	Earnings[2]	Distance	Rate[1]	Earnings[2]
	Miles	Cents		Miles	Cents		Miles	Cents	
Tioga, W. Va.	561	31.38	$163.66	675	34.38	$179.30	389	29.38	$153.22
Allingdale, W. Va.	551	28.5	148.66	665	31.5	164.30	379	26.5	138.22
Richwood, W. Va.	569	.....	.....	683	.....	.....	397	.....	.....
Cauley Mills, W. Va.	550	.....	.....	664	.....	.....	378	.....	.....
Curtin, W. Va.	560	.....	.....	674	.....	.....	388	.....	.....
Arcola, W. Va.	536	.....	.....	650	.....	.....	364	.....	.....
Centralia, W. Va.	522	.....	.....	636	.....	.....	350	.....	.....
Pickens, W. Va.	519	.....	.....	633	.....	.....	350	.....	.....
Gunoreet, W. Va.	515	.....	.....	629	.....	.....	346	.....	.....
Midvale, W. Va.	499	.....	.....	613	.....	.....	334	.....	.....
Marion, W. Va.	458	25.5	133.01	572	30	156.48	319	23.5	122.58
Jessop, W. Va.	460	.....	.....	574	.....	.....	321	.....	.....
Hawesville, W. Va.	462	.....	.....	576	.....	.....	323	.....	.....
Mattingly, W. Va.	463	.....	.....	577	.....	.....	324	.....	.....
Snider, W. Va.	466	.....	.....	580	.....	.....	327	.....	.....
Kingwood, W. Va.	468	.....	.....	582	.....	.....	329	.....	.....
Frostburg, Md.	...	.....	.....	620	31.5	164.30	448	26.5	138.22
Midland, Md.	...	.....	.....	644	.....	.....	472	.....	.....
New Detmold, Md.	...	.....	.....	651	.....	.....	479	.....	.....

1 Rate reduced to cents per 100 pounds including $15 per car, charge of S. C. & W.
2 Earnings per car based on 52,160 pounds, the average loading of complainant's shipments.

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other transportation conditions. *United States* v. *Illinois Cent. R. R., supra.* No showing has been made in the instant case that the cost of service from Tioga and Delphi was no greater than the cost of transportation from other points taking the same group rate; that the value of the service was the same; or that other traffic conditions incident to shipment from Tioga and Delphi were so similar to those of shipments from other points enjoying lower rates that the prejudice to which complainant and intervener had been subjected was undue and unreasonable.

(Statement of rates assailed, side folios 45, 46, and 47.)

48 EXHIBIT G.

Order of the Interstate Commerce Commission, Described in Paragraph XIX.

49 Order.

At a Session of the Interstate Commerce Commission, Division 3, Held at Its Office, in Washington, D. C., on the 29th Day of May, A. D. 1928.

No. 19191.

THE BIRCH VALLEY LUMBER COMPANY

v.

STROUDS CREEK AND MUDDLETY RAILROAD COMPANY; The Baltimore and Ohio Railroad Company; The Akron, Canton & Youngstown Railway Company; Alton & Eastern Railroad Company; The Ann Arbor Railroad Company; The Atchison, Topeka and Santa Fe Railway Company; Atlantic City Railroad Company; Atlantic Coast Line Railroad Company; The Baltimore and Ohio Chicago Terminal Railroad Company; Bath and Hammondsport Railroad Company; The Belt Railway Company of Chicago; Bessemer and Lake Erie Railroad Company; The Bloomsburg and Sullivan Railroad Company; Boston and Albany Railroad (The New York Central Railroad Company, Lessee); Boston and Maine Railroad; Boyne City, Gaylord and Alpena Railroad Company; Buffalo & Susquehanna Railroad Corpora-

tion; Buffalo, Rochester and Pittsburgh Railway Company; Bush Terminal Railroad Company; Canadian Pacific Railway Company; Central Indiana Railway Company; Central New England Railway Company; The Central Railroad Company of New Jersey; Central Vermont Railway Company; Central West Virginia & Southern Railroad Company; Chestnut Ridge Railway Company; The Chicago and Alton Railroad Company, and William W. Wheelock and William G. Bierd, Receivers; Chicago and Eastern Illinois Railway Company; Chicago and Erie Railroad Company; Chicago & Illinois Midland Railway Company; Chicago and North Western Railway Company; Chicago, Burlington & Quincy Railroad Company; Chicago Great Western Railroad Company; Chicago, Indianapolis and Louisville Railway Company; Chicago, Kalamazoo and Saginaw Railway Company; Chicago, Milwaukee and Gary Railway Company; Chicago, Milwaukee and St. Paul Railway Company and H. E. Byram, Mark W. Potter and Edward J. Brundage, Receivers; Chicago, North Shore and Milwaukee Railroad Company; Chicago, Peoria and St. Louis Railroad Company and William Cotter, Receiver; The Chicago, Rock Island and Pacific Railway Company; Chicago, Springfield & St. Louis Railway Company; The Cincinnati, Indianapolis & Western Railroad Company; The Cincinnati Northern Railroad Company; Clarion River Railway Company; Clinton, Davenport & Muscatine Railway Company; Cumberland and Pennsylvania Railroad Company; Dayton and Union Railroad Company; the Delaware and Hudson Company; The Delaware, Lackawanna and Western Railroad Company; Detroit and Mackinac Railway Company; The Detroit and Toledo Shore Line Railroad Company; Detroit, Toledo and Ironton Railroad Company; East Jersey Railroad and Terminal Company; East St. Louis Connecting Railway Company; Elgin, Joliet and Eastern Railway Company; Erie & Michigan Railway & Navigation Company; Erie Railroad Company; Evansville, Indianapolis & Terre Haute Railway Company; The Gettysburg and Harrisburg Railway Company; Goodrich Transit Company; The Chicago, Detroit and Canada Grand Trunk Junction Railroad Company, (Canadian National Railway Company, Lessee); Cin-

cinnati, Saginaw and Mackinaw Rail Road Company (Canadian National Railway Company, Lessee); Detroit, Grand Haven and Milwaukee Railway Company; Grand Trunk-Milwaukee Car Ferry Company; Grand Trunk Western Railway Company; The Michigan Air Line Railway; Toledo, Saginaw and Muskegon Railway Company; Illinois Central Railroad Company; Illinois Terminal Company; Illinois Traction, Inc.; St. Louis Electric Terminal Railway Company; Indiana Harbor Belt Railroad Company; Indian Creek Valley Railway Company; The Ironton Railroad Company (Lehigh
50 Valley Railroad Company and Reading Company, Lessees); Jacksonville & Havana Railroad Company; Jamestown, Westfield and Northwestern Railroad Company; The Kansas and Sidell Railroad Company; Lackawanna and Wyoming Valley Railroad Company; The Lehigh and Hudson River Railway Company; Lehigh and New England Railroad Company; Lehigh Valley Railroad Company; The Lima & Defiance Railroad Company; Litchfield and Madison Railway Company; The Long Island Rail Road Company; The Lorain & West Virginia Railway Company; Louisville and Nashville Railroad Company; Louisville, Henderson & St. Louis Railway Company; Manistee and North-Eastern Railroad Company and The Michigan Trust Company, Receiver; Maryland and Pennsylvania Railroad Company; The Michigan Central Railroad Company; Michigan Railroad Company and John F. Collins, Receiver; Middletown and Unionville Railroad Company; The Minneapolis & St. Louis Railroad Company and W. H. Bremner, Receiver; Minneapolis, St. Paul & Sault Ste. Marie Railway Company; Missouri Pacific Railroad Company; Mobile and Ohio Railroad Company; The Monongahela Railway Company; Montour Railroad Company; Moshassuck Valley Railroad Company; The Nashville, Chattanooga & St. Louis Railway; The New York and Long Branch Railroad Company; New York and Pennsylvania Railway Company; The New Jersey and New York Railroad Company; New Jersey, Indiana & Illinois Railroad Company; The New York Central Railroad Company; The New York, Chicago and St. Louis Railroad Company; New York Dock Railway; The New York, New Haven and Hartford Railroad Company;

New York, Ontario and Western Railway Company; New York, Susquehanna and Western Railroad Company; Norfolk and Western Railway Company; The Northern Ohio Railway Company; The Ohio Public Service Company; Paducah & Illinois Railroad Company; The Pennsylvania Railroad Company; Peoria and Pekin Union Railway Company; Peoria Railway Terminal Company and H. I. Battles, Receiver; Pere Marquette Railway Company; The Pittsburgh and Lake Erie Railroad Company; The Pittsburgh, Shawmut Railroad Company; The Pittsburgh & West Virginia Railway Company; Pittsburgh, Chartiers & Youghiogheny Railway Company; The Pittsburgh, Lisbon & Western Railroad Company; The Pittsburg, Shawmut & Northern Railroad Company and John D. Dickson, Receiver; The Pontiac, Oxford and Northern Railroad Company; Quebec Central Railway Company; Rahway Valley Company (Rahway Valley Company, Lessee); Raritan River Rail Road Company; Reading Company; Reynoldsville and Falls Creek Railroad Company; Richmond, Fredericksburg and Potomac Railroad Company; Rock Island Southern Railway Co.; Rutland Railroad Company; St. Louis and Hannibal Railroad Company; St. Louis Merchants Bridge Terminal Railway Company; The St. Louis Transfer Railway Company; The St. Louis, Troy and Eastern Rail Road Company; Seaboard Air Line Railway Company; The Sharpsville Railroad Company and G. M. McIlvain, Receiver; South Brooklyn Railway Company; Southern Railway Company; The Staten Island Rapid Transit Railway Company; Terminal Railroad Association of St. Louis; Toledo, Peoria & Western Railway Company and Samuel M. Russell, Receiver; United Electric Railways Company; The Virginian Railway Company; The Virginia Railway Company; The Wabash, Chester and Western Rail Road Company and J. Fred Gilster, Receiver; Wabash Railway Company; Western Allegheny Railroad Company; Western Maryland Railway Company; The Westfield Railroad Company; West Jersey and Seashore Railroad Company; West Shore Railroad (The New York Central Railroad Company, Lessee); West Side Belt Railroad Company; West Virginia Northern Railroad Company; Wharton and Northern Railroad Company; The Wheeling and

Lake Erie Railway Company; The Wiggins Ferry Company; The Wilkes-Barre and Eastern Railroad Company; Williamsport & North Branch Railway Co.; The Williams Valley Railroad Company; The Winfield Railroad Company; Yale Short Line Railroad Company; and The Youngstown & Ohio River Railroad Company.

51 This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof; and said division having found in said report that the rates charged for the transportation of lumber, in carloads, from Tioga and Delphi, W. Va., to interstate destinations in Canada, trunk-line territory, New England, and central territory, in so far as they apply to transportation within the United States, are and for the future will be unduly prejudicial to complainant and unduly preferential of its competitors in the same general origin territory to the extent that they exceed or may exceed the rates contemporaneously maintained on like traffic from the group which includes Allingdale, W. Va.

It is ordered, That the above-named defendants, according as they participate in the transportation within the United States, be, and they are hereby, notified and required to cease and desist on or before August 15, 1928, and thereafter to abstain from practicing the undue prejudice and preference referred to in the next preceding paragraph hereof.

It is further ordered, That said defendants, according as they participate in the transportation within the United States, be, and they are hereby, notified and required to establish on or before August 15, 1928, upon notice to this commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply regulations and practices which will prevent and avoid the undue prejudice and preference referred to in the first paragraph hereof.

And it is further ordered, That this order shall continue in force until the further order of the commission.

By the commission, division 3.

[SEAL.] GEORGE B. McGINTY,
Secretary.

52 EXHIBIT H.

Commission's Order Denying Petition for Rehearing and/or Reargument, Described in Paragraph XXII.

53 Order.

At a General Session of the Interstate Commerce Commission, Held at Its Office, in Washington, D. C., on the 2nd Day of February, A. D. 1931.

No. 19191.

BIRCH VALLEY LUMBER COMPANY

v.

STROUDS CREEK & MUDDLETY RAILROAD COMPANY et al.

Upon further consideration of the record in the above-entitled proceeding, and of complainant's petition for rehearing and/or reargument in the above-entitled case:

It is ordered, That the said petition be, and it is hereby, denied.

By the Commission.

[SEAL.] GEORGE B. McGINTY,
Secretary.

54 *Rule to Show Cause.*

Filed June 20, 1932.

* * * * * * *

Upon consideration of the petition filed in the above-entitled cause, it is, this 20th day of June, 1932,

Ordered, That the respondent, the Interstate Commerce Commission, show cause on or before the 15th day of July, 1932, why the prayer of the petition should not be granted, and the writ of mandamus issued, compelling the respond-

ent to enter an order directing the payment of damages to the relators, J. C. Campbell, R. M. Campbell, J. R. Campbell, C. W. Amsler, and Henry Amsler, trading as The Birch Valley Lumber Company, a partnership, in such amount as the payments made by relators exceeded the rates contemporaneously maintained on like traffic from the group which included Allingdale, W. Va., provided a copy of this order and the petition are served upon the defendant on or before the 25th day of June, 1932.

By the Court:

JESSE C. ADKINS,
Justice.

55 *Marshal's Return.*

Served a copy of the above rule & petition on Interstate Commerce Comm., by George B. McGinty, Secty., 6-20-32, personally.

EDGAR C. SNYDER,
U. S. Marshal in and for
the Dist. of Columbia,
By J. W. ROBERTS,
Deputy U. S. Marshal.

56 *Answer of the Interstate Commerce Commission.*

Filed June 27, 1932.

* * * * * * *

The Interstate Commerce Commission, the respondent in the above-entitled cause, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the Relators' petition contained, for answer thereunto or unto so much or such parts thereof as this respondent is advised is material for it to make answer unto, answers and says:

I. Answering Paragraphs I to IV, inclusive, of the petition, the respondent, hereinafter called the Commission, admits that the allegations contained in said paragraphs are true. As hereinafter referred to, whenever the word "relator" is used in this answer, it will be understood to

mean either The Birch Valley Lumber Company, a
57 corporation, as defined in Paragraph I of the petition, or its successor or assignee in interest, The Birch Valley Lumber Company, a partnership, as defined in Paragraph III.

II. Answering Paragraphs V to X, inclusive, of the petition, the Commission admits that the allegations therein contained relating to provisions of the Interstate Commerce Act are substantially correct. In this connection, however, the Commission refers the Court to the provisions mentioned for more full and complete information in the premises.

III. Answering Paragraph XI, of the petition, the Commission admits that this paragraph contains a correct copy of Rule V of its Rules of Practice, relating to reparation statements.

IV. Answering Paragraph XII of the petition, the Commission admits that the allegations contained in said paragraph are true.

V. Answering Paragraphs XIII and XIV of the petition, the Commission admits that the allegations therein contained are substantially correct, but for more full and complete information in the premises concerning the contents thereof the Commission respectfully refers the Court to the complaint of January 11, 1927, referred to in Paragraph XII, a true copy of which is attached to and made a part of the petition as Exhibit C.

58 VI. Answering Paragraphs XV and XVI of the petition, the Commission admits that the allegations contained therein are true. In this connection the Commission respectfully refers the Court to copies of the answers referred to in said paragraphs, attached to the petition and made parts thereof as Exhibits D and E, for full and complete information as to the contents thereof.

VII. Answering Paragraphs XVII to XIX, inclusive, of the petition, the Commission admits that evidence was taken on behalf of complainant and defendants and that the matter was heard on oral argument before Division 3, as alleged in Paragraph XVII. The Commission denies that the passages in Paragraphs XVII and XVIII quoted from the Commission's report of May 29, 1928, constitute a full and complete statement of the findings, holdings and conclu-

sions of the Commission in the case; and the Commission respectfully refers the Court to copies of said report and order, which are attached to the petition herein as Exhibits F and G, respectively, for full and complete information as to the contents thereof. In this connection the Commission alleges that the words and figures appearing in line two of page 9 of the petition herein should read "May 29, 1928" instead of "May 19, 1928".

VIII. Answering Paragraph XX of the petition, the Commission admits that the allegations contained therein are true.

59 IX. Answering Paragraph XXI of the petition, the Commission denies that its findings are completely or fully set out in said paragraph. For more full and complete information in the premises, the Commission respectfully refers the Court to its report and order, attached to and made parts of the petition herein, as Exhibits F and G, respectively. The Commission also denies that, under the facts as shown by the evidence and as found by it, any duty rested upon it to make an award of damages in this proceeding. In this connection the Commission alleges that in making said report and order it found that on the record before it, there was no support for an award of reparation to relators.

X. Answering Paragraph XXII of the petition, the Commission denies that the conclusions reached by it in its report and order of May 29, 1928, were erroneous; it also denies that relator is entitled to reparation in any amount as a result of its proceeding before the Commission. The Commission admits the other allegations contained in said paragraph.

XI. Answering Paragraph XXIII of the petition, the Commission denies it found in said report and order of May 29, 1928, referred to in Paragraph IX of the petition, that relators had suffered any damage. On the contrary, the Commission alleges specifically that its finding was: "The record will not support an award of reparation based on the undue prejudice found to exist". The

60 Commission also denies that in said report and order of May 29, 1928, there was in law either neglect, failure, or refusal of the Commission to exercise fully its lawful jurisdiction relative to the complaint involved

therein and the evidence presented to it thereunder; denies that its action in the proceeding was in any respect arbitrary; denies that it either neglected, failed, or refused to discharge any legal duty imposed upon it; denies that in determining the amount of damages resulting from a violation of the Interstate Commerce Act it does not exercise discretion or judgment, and denies that such action is purely ministerial in nature.

Further answering Paragraph XXIII of the petition, the Commission denies that relator will suffer any legal injury as a result of the Commission's report and order of May 29, 1928. The Commission alleges that none of the other allegations contained in said paragraph is either relevant or material.

XII. Further answering the petition, the Commission alleges that prior to the making, entering and serving of said report and order of May 29, 1928, it accorded to the parties to the proceeding, including the relators herein, the full hearing provided for by the Interstate Commerce Act; that in said hearing a large volume of testimony and other evidence bearing upon the matters covered in said report and order was submitted to the Commission for consideration, including testimony and other evidence submitted on behalf of relators herein by their counsel; that at
61 said hearings and subsequently, both orally and in briefs filed in said proceeding, questions relating to said matters were fully argued and submitted to the Commission for determination, on behalf of said parties by their respective counsel, whereupon the Commission determined said matters and entered and served upon all the parties to said proceeding, including the relators herein, its said report and order; that said report and order included the Commission's findings of fact, decision, conclusions, order, and requirements in the premises, and that, upon the evidence aforesaid, and as shown in and by said report, the Commission made the findings and stated the conclusions, upon which said order is based. That said findings and conclusions were and are, and that each of them was and is, fully justified by the evidence before the Commission in said proceeding. The Commission further alleges that in making said report and order it considered and weighed carefully each fact, circumstance and condi-

tion, arising from the evidence presented, or called to its attention by or on behalf of the parties to said proceeding by their respective counsel.

XIII. Further answering the petition, the Commission denies that the relators are entitled to the relief prayed for, or any relief in the premises, and except as hereinabove expressly admitted, the Commission denies the truth of each and all the allegations contained in said petition, in so far as they conflict either with the allegations in this answer, or with the statements or conclusions of fact set out in said report and order of the Commission, which are hereby referred to and made a part hereof.

62 All of which matters and things the Commission is ready to aver, maintain, and prove, as this Honorable Court shall direct, and hereby prays that said petition be dismissed.

INTERSTATE COMMERCE COMMISSION,
By EDWARD M. REIDY,
Assistant Chief Counsel.
DANIEL W. KNOWLTON,
Of Counsel.

CITY OF WASHINGTON,
District of Columbia, ss:

Claude R. Porter, being duly sworn, deposes and says that he is a member and Chairman of the Interstate Commerce Commission, the above-named respondent, and makes this affidavit on behalf of said Commission, that he has read the foregoing answer and knows the contents thereof, and that the same is true.

CLAUDE R. PORTER.

Subscribed and sworn to before the undersigned a Notary Public within and for the District of Columbia, this 24th day of June, 1932.

[SEAL.] EUGENIA W. SUTER,
Notary Public.

63 *Demurrer to Respondent's Answer.*

Filed July 2, 1932.

* * * * * * *

The plaintiff relators say that the answer of the respondent Interstate Commerce Commission is bad in substance.

For reasons for said demurrer, and the matters of law intended to be argued in support thereof, the relators assign the following:

I. The petition states a cause of action, and the respondent's answer admits the essential allegations of the petition and makes no material allegations of fact in contravention of the petition.

II. The petition alleges, and the answer admits, that after due hearing the Commission found a violation of law in the past and present by defendant carriers.

III. The petition alleges, and the answer of the respondent admits, that with respect to the acts of defendant carriers, the Commission found:

(1) "On shipments of lumber the S. C. & M. charges $15 per car for its service to the junction point, which is in addition to the rate from the junction."

(2) "The lumber is sold in competition with that produced throughout the country and especially that
64 produced in the same general territory."

(3) "there appears to be no question that complainant is forced to base its prices on the group rates and absorb the charges of the S. C. & M."

(4) "the rates assailed, insofar as they apply within the United States, were not and are not unreasonable, but were, are, and for the future will be unduly prejudicial to complainant and unduly preferential of its competitors in the same general origin territory to the extent that they exceeded, exceed or may exceed the rates contemporaneously maintained on like traffic from the group which includes Allingdale, West Virginia."

The aforesaid findings constitute a determination that the complainant was damaged by the violations of law by the defendant carriers in the amount of $15.00 per each and every car transported for the complainant by defendant carriers during the period from January 11, 1925 to January 14, 1929.

IV. The Commission is empowered by the statute to hear and determine controversies relating to the award of reparation for damages sustained by reason of the violation of the Interstate Commerce Act. This function of the respondent Commission is purely judicial in nature. The

Commission is required by the provisions of the Interstate Commerce Act, after a determination of damage by reason of violations of the said Act, to enter an order awarding reparation to the complainants. This latter function of the Commission is in no sense judicial but is purely ministerial in nature. The discretion of the Commission was
65 fully exercised in its judicial determination, (1) that there had been a violation of the Act by defendant carriers, and (2) that there had been resulting damage to the complainant. The remaining duty of the Commission which is here sought to be enforced, is the purely ministerial duty of entering an order for the award of reparation to the complainant in which duty there is involved not a single element of judgment or discretion.

V. The Commission has fully discharged its duty insofar as the exercise of its discretion is concerned. From the exercise of that discretion it has found in all respects favorable to the complainant. By failing and refusing to enter an order carrying into effect its findings and judgment, the Commission has inflicted upon the relators an injury for which there is no adequate remedy other than a writ of mandamus from this court, requiring the Commission to carry out the requirements of the Interstate Commerce Act.

A. HENRY WALTER,
WILLIAM S. BRONSON,
JOHNSTON B. CAMPBELL,
A. HENRY WALTER,
Attorneys for Relators.

An oral hearing of the foregoing demurrer is respectfully requested. In my judgment it will require at least one hour for each side to present the oral argument.

A. HENRY WALTER,
Attorney for Relators.

Service of a copy of the foregoing demurrer, together with the attached statement of points and authorities in support thereof, acknowledged this 2nd day of July, 1932.

EDWARD M. REIDY,
Attorney for Respondent.

66 *Memorandum.*

Filed September 29, 1932.

* * * * * * *

In my opinion this case is controlled by *Donner Steel Co. v. I. C. C.*, 52 App. D. C. 221 and *I. C. C. ex rel. Capital Grain & Feed Co.* 59 App. D. C. 118.

Under these decisions the answer states a complete defense. Therefore the demurrer to the answer is overruled.

September 28, 1932.

JESSE C. ADKINS,
Justice.

67 *Judgment.*

Filed October 4, 1932.

* * * * * * *

This cause coming on to be heard upon the petition and the exhibits thereto attached, the answer of the respondent to said petition and the demurrer of the relator to said answer, and upon consideration thereof, it is ordered, adjudged and decreed, this 4th day of October, 1932, that said demurrer be, and the same is hereby, overruled.

Thereupon the petitioner by its attorneys elects to stand upon its demurrer. Wherefore, it is considered that the petition herein be, and the same is hereby dismissed, that petitioner take nothing by this suit, that respondent go hence without day and recover of petitioner its costs of defense to be taxed by the clerk and have execution thereof.

JESSE C. ADKINS,
Justice.

From the foregoing judgment the petitioner, by its said attorneys, in open court, notes an appeal to the Court of Appeals; whereupon, the maximum of an undertaking for costs is hereby fixed in the sum of One Hundred Dollars, with leave to deposit the sum of Fifty Dollars with the clerk in lieu thereof.

JESSE C. ADKINS,
Justice.

October 4, 1932.

O K as to form.
A. HENRY WALTER,
Attorney for Relators.

68 *Memorandum.*

October 4, 1932.—$50 deposit in lieu of Bond on appeal.

69 *Assignment of Errors.*

Filed October 4, 1932.

* * * * * * *

Now come the relators in the above-entitled cause, by their attorney, assigning errors in the order and judgment entered herein on October 4, 1932, and respectfully show that the Court erred as follows:

1. The Court erred in overruling the demurrer to respondent's answer.

2. The Court erred in entering judgment for the respondent Interstate Commerce Commission.

3. The Court erred in denying the relief prayed by relators, in dismissing their petition, and in refusing to issue a writ of mandamus commanding the Interstate Commerce Commission to enter an award of reparation in favor of the relators.

A. HENRY WALTER,
Attorney for Relators.

Service of a copy of the foregoing assignment of errors acknowledged this 4th day of October, 1932.

E. M. REIDY,
Attorney for Respondent.

70 *Designation of Record.*

Filed October 4, 1932.

* * * * * * *

The clerk will please prepare the record on appeal in the above-entitled cause and include therein the following papers and proceedings:

1. Petition for a writ of mandamus, and exhibits thereto.

2. Rule to Show Cause, issued June 25, 1932.

3. Answer of the respondent Interstate Commerce Commission.

4. Demurrer to respondent's answer.

5. Opinion of the Court dated September 28, 1932.
6. Judgment entered on the 4th day of October, 1932.
7. Memorandum and bond on appeal or deposit for costs.
8. Assignment of errors.
9. This designation of record.

A. HENRY WALTER,
A. HENRY WALTER,
Attorney for Relators.

Service of a copy of the foregoing designation of record is hereby acknowledged this 4th day of October, 1932.

EDWARD M. REIDY,
Attorney for Respondent.

71 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 70, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 81439 at Law, wherein United States of America, on the relation of J. C. Campbell, et al. trading as The Birch Valley Lumber Company, a partnership, are Relators and The Interstate Commerce Commission is Respondent, as the same remains upon the files and of record in said Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 14th day of October, 1932.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 5816. United States of America on the relation of J. C. Campbell et al., appellants, vs. The Interstate Commerce Commission. Court of Appeals, District of Columbia. Filed Oct. 14, 1932. Henry W. Hodges, Clerk.

53 Friday, January 6th, A. D. 1933

* * * * * * *

No. 5816

UNITED STATES OF AMERICA ON THE RELATION OF J. C. CAMPBELL, R. M. Campbell, J. R. Campbell, C. W. Amsler, and Henry Amsler, Trading as the Birch Valley Lumber Company, a Partnership, appellants

vs.

THE INTERSTATE COMMERCE COMMISSION

On motion, the appellants are allowed to file a reply brief herein.

The argument in the above-entitled cause was commenced by Mr. A. Henry Walter, attorney for the appellants, and was continued by Mr. Edward M. Reidy, attorney for the appellee, and was concluded by Mr. A. Henry Walter, attorney for the appellants.

54 Court of Appeals of the District of Columbia

No. 5816

UNITED STATES OF AMERICA ON THE RELATION OF J. C. CAMPBELL, R. M. Campbell. J. R. Campbell. C. W. Amsler, and Henry Amsler, Trading as the Birch Valley Lumber Company, a Partnership, appellants

v.

THE INTERSTATE COMMERCE COMMISSION, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

(Argued January 6, 1933. Decided January 30, 1933)

Johnston B. Campbell and A. Henry Walter, both of Washington, D. C., for appellants.

Edward M. Reidy, of Washington, D. C., for appellee.

Before MARTIN, *Chief Justice*, and ROBB, VAN ORSDEL, HITZ, and GRONER, *Associate Justices*

GRONER, *Associate Justice:* This is an appeal from a judgment of the Supreme Court of the District of Columbia dismissing a petition for a writ of mandamus to the Interstate Commerce Commis-

sion. The commission answered the petition, and petitioner demurred. The court overruled the demurrer and entered judgment for the commission.

Petitioner is a partnership, successor to a West Virginia corporation of the same name. Disregarding this change in character, we shall speak of petitioner and its predecessor as appellant.

Appellant was engaged in the lumber business. Early in 1927 it filed with the commission a complaint charging certain violations of the interstate commerce act by the Strouds Creek & Muddlety Railroad Co., the B. & O. Railroad Co., and other connecting carriers, and alleging damage by reason of the violation. It asked for an order against the railroads to "cease and desist" and for reparation for their unlawful acts within the statutory period. Appellant's mills are located on the Strouds Creek Railroad at Tioga, West Virginia, 7.1 miles distant from the junction point of the B. & O. and Strouds Creek, at Allingdale, West Virginia. Appellant's lumber was shipped on through bills of lading from Tioga to interstate destinations on lines of Strouds Creek, B. & O.,
55 and connecting carriers via Allingdale. Appellant was compelled to pay the Allingdale group rate plus the Strouds Creek Railroad charge of $15 per car.

The commission found that appellant's competitors, having their mills within the Allingdale group and located on branch lines of the B. & O., paid only the Allingdale rate, which was $15 per car less than the charges exacted of appellant for the service from its mills to the same destinations. The result of this was that appellant was required to pay $15 more for each car of lumber shipped than its competitors. The commission likewise found that appellant's prices were all quoted f. o. b. Allingdale; that it sold its lumber in competition with that produced in the same general territory, and was forced to base its price on the group rates and to absorb the $15 per car charge of the Strouds Creek road. In these circumstances the commission found that the through interstate rates exacted of appellant "were, are, and for the future will be unduly prejudicial to complainant and unduly preferential to its competitors in the same general origin territory to the extent that they exceeded, exceed, or may exceed the rates contemporaneously maintained on like traffic from the group which includes Allingdale, West Virginia," and consequently entered an order requiring the railroads participating in transportation of appellant's lumber within the United States to cease and desist, etc. But the commission also found that "the record will not support an award of reparation based on the undue prejudice found to exist." The conclusion last stated is the bone of contention.

On behalf of the commission it is insisted that mandamus will not lie in a matter involving the exercise of judgment or discretion and that this is such a case, and in support of this it says that the recovery of damages by a shipper on account of a discriminatory rate involves a judicial inquiry of facts on the one hand and discretion in technical matters on the other, and that the commission, by reason of its more expert appreciation of the intricacies of transportation, is in a better position to reach a correct determination, and that its conclusion thus reached, being discretionary, may not be impeached in a proceeding by mandamus. It urges also the well-established rule that mandamus can not be used as an appeal or to perform the functions of a writ of error. To sustain its position here it relies largely upon the cases of *I. C. C.* v. *Waste Merchants' Association*, 260 U. S. 32, and particularly *Donner Steel Co.* v. *I. C. C.*, 285 Fed. 955, a decision of this court in which certiorari was denied.

We have, therefore, here a case in which the commission has found that appellant has been required to pay transportation charges which are unduly prejudicial to the extent of $15 per car; that appellant's competitors enjoyed a $15 less per car rate, and that appellant was forced to base its price on its competitors' price and itself absorb the $15 unlawful charge, but in which the commission nevertheless refuses to award reparation.

The interstate commerce act (U. S. C. A., tit. 49) in section 3 makes it unlawful for a common carrier to subject a shipper "to any undue or unreasonable prejudice or disadvantage in any respect whatsoever," and section 8 makes the carrier which shall do so liable to the person injured for the full amount of damages sus-
56 tained in consequence of such violation. It gives such person (section 9) the right to recover either before the commission or in the Federal courts but requires an election of forum. If the election is to proceed before the commission, the person injured is required to state the facts, upon which it becomes the duty of the commission, unless reparation is voluntarily made, to investigate the complaint and likewise to make an award of reparation if after hearing it shall determine the shipper was damaged.

Section 16 (1) is as follows:

"If, after hearing on a complaint made as provided in section 13 of this chapter, the commission shall determine that any party complainant is entitled to an award of damages under the provisions of this chapter for a violation thereof, the commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named."

From what we have already said, it is obvious that in this case appellant has shown,and the commission has found, the violation of law complained of, and likewise that appellant had sustained an

injury and pecuniary loss by reason of the injury to the extent of $15 for each car of lumber shipped within the statutory period. In these circumstances it would seem to us that there is no ground upon which refusal on the part of the commission to enter the order for reparation can be sustained. But the contrary of this is nevertheless urged, and it is insisted that the commission having said that appellant is not entitled to reparation, that question is foreclosed and to award the writ would be to require it to make an award contrary to its judgment and discretion. In other words, that its determination of the fact is the exercise of a jurisdiction conferred upon it by law, and that to challenge this by mandamus would be to convert the writ into an appeal or writ of error, which it has been repeatedly held may not be done.

But this reasoning does not appeal to us. The object and purpose of the act are clear. It was passed to require not only just and reasonable railroad rates but also to preserve to shippers equal competition by the maintenance of equality of rates and thus equality of opportunity, and so in a case in which, as in this, the question is one of competitive rates or charges discriminatory as between shippers in the same territory, gives power to the commission, when such a charge is sustained, to do two things—to require the carrier to cease and to require it to make reparation to the injured shipper. It is quite true that the act gives the commission wide latitude and great powers, and properly so, and it is equally true that in a proceeding of this nature a court will not review the decision of the commission on the merits or compel a particular exercise by the commission of its judgment or discretion, but where the commission has exercised all of its jurisdiction and exhausted all its discretion and has made a definite, conclusive, understandable finding of facts, including the fact of damage and the fact of loss sustained thereby, the question is not one of those stated above but is rather whether in such circumstances the writ is one to require the commission to perform a specific duty prescribed by the act. We think it is, and we likewise think that to reach a different conclusion would require us to confess our impotency to correct a judgment of the commission based on a conclusion not only unsupported by facts but directly in the teeth of its own findings of facts. This we are unwilling to do.

57 But it is insisted by the commission that this is just what we did do in the *Donner Steel Co. case, supra.* That there is a similarity between that and this case is undeniable, and in deciding that case we expressed our disapproval with the conclusion we felt obliged to reach. It therefore has no very great margin, and we are not disposed to increase it. But, without regard to this, we think

that the cases are easily distinguishable. The *Donner case* involved a service performed by the carrier of "spotting" cars, and in which it was alleged that the service was performed for some and denied to others, and this practice the commission found prejudicial and in violation of section 3 of the act, but the commission also found that the complainant there had not shown that its profits would have been any greater had the existing discrimination and prejudice been removed, "or that it has suffered any damage of which such discrimination and prejudice are the proximate cause." Our conclusion in refusing to order the writ to issue was based on the ground that the commission had definitely and unmistakably decided from the evidence before it that the shipper had not been damaged, and it is interesting to note that after our decision a petition for rehearing was granted by the commission in which the shipper asked a reconsideration by the commission of this question of fact. The ground of asking was the apparent inconsistency between the conclusion and that in *Buffalo Union Furnace Co.* v. *L. S. & M. S. Ry. Co.*, 44 I. C. C. 267. In its decision again denying the shipper's claim for reparation, the commission distinguished the facts in the *Buffalo case* from those in the *Donner Steel case*, pointing out that in the former case it was shown that the shipper was compelled to absorb the cost of certain terminal switching out of its profits and that from this it "inevitably" followed that the shipper suffered a loss in profits measured by the cost of this switching service, and therefore was damaged to that extent, but this, the commission said, was not true in the *Donner case*.

Here, as we have already seen, the facts found by the commission are in all respects similar to those found in the *Buffalo Union case*, and therefore the instant case differs from the *Donner Steel case* in the same respect as the *Buffalo Union case* differed from that case. This makes it apparent that the *Donner case* does not control this.

Nor is there anything in *I. C. C.* v. *Waste Merchants Association*, *supra*, which may be considered as controlling our decision here. That case and this are wholly different. There, as the Supreme Court said, the rates were neither unreasonable nor discriminatory nor in violation of the act. The conditions there found were an incident of the World War. The arrangement for loading was voluntary and beneficial to the shipper. There was no provision in the tariffs for the allowance to shippers who themselves loaded their cars. Since, therefore, neither of the cases relied on by the commission controls the decision here, we are free to answer the question as we think it should be answered.

If we should hold that the commission may not be required to reach a conclusion consonant with its own findings, section 16 of the

act would, we think, be meaningless. It would be to construe the language of the section—"If the commission shall determine that any party complainant is entitled to an award of damages"—to 58 mean that the discretion of the commission—to "determine"—was not subject to challenge on any ground and that the commission's *ipse dixit* would control against the plain mandate of the act. We think this is not the law.

In this case the commission has found, as we have pointed out, unlawfulness of rate, injury and damage, and the amount of loss. In these circumstances nothing more is necessary than the mere matter of the multiplication of the number of cars by the ascertained overpayment per car. If there is any other element entering into the computation of damages which might change this result, there is nothing in the commission's findings of facts to indicate it. The statement is made by the commission that appellant's prices are fixed by the prices of its competitors who enjoy the $15 preferential. If this were not true, or if appellant's prices were only partially so controlled, a different case might be made, and in such circumstances appellant's loss would be computed on a different basis. But nothing of this sort appears, and the only suggestion of justification for the commission's refusal to make the award, and this was made in the argument, is that appellant in producing its lumber may have an advantage of operating and labor cost which its competitors do not have. We do not think this fact, even if it be true, would reduce appellant's recoverable damages under the statute. In such circumstances, in view of the finding of equality of price with its competitors, its profits would have been greater to the extent of its lower cost of production; but when, on the other hand, as appears from the findings of fact, it was required to reduce its profits $15 per car by the prejudicial rate it was forced to pay, the latter figure in the circumstances necessarily represents its damages, since obviously otherwise its profits would have been that much more.

Hence it follows that the determination of the commission that reparation should not be awarded is a mere conclusion contrary to its own findings of fact and therefore contrary to the provisions of the act. In such a case the granting of the writ is not the control of a particular discretion or a substitution of the judgment of this court for that of the commission but a lawful order to the commission to carry into effect the plain result of the exercise by it of its discretion—a situation in all respects analogous to an order to an inferior court to sign a judgment which it rendered but refused to sign. Any other conclusion than this, it seems to us, would be an anomaly and would amount to saying that an essential duty of the commission is beyond review, for appellant has no other remedy. (*Procter & Gamble* v. *United States*, 225 U. S. 282.)

We think the lower court was in error in refusing to issue the writ, and the case will be remanded with instructions that the judgment be set aside and the writ issue to the commission requiring it to assess the damages sustained in accordance with the provisions of the act and to enter the appropriate order thereon.

Reversed and remanded.

A true copy.

Teste:

Clerk, Court of Appeals, D. C.

59 Monday, January 30th, A. D. 1933

* * * * * * *

No. 5816, January Term, 1933

UNITED STATES OF AMERICA ON THE RELATION OF J. C. CAMPBELL, R. M. Campbell, J. R. Campbell, C. W. Amsler, and Henry Amsler, Trading as the Birch Valley Lumber Company, a Partnership, appellants

vs.

THE INTERSTATE COMMERCE COMMISSION

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be and the same is hereby reversed and that this cause be, and the same is hereby remanded to the said Supreme Court with instructions that the judgment be set aside and the writ issue to the Commission requiring it to assess the damages sustained in accordance with the provisions of the act and to enter the appropriate order thereon.

Per Mr. Justice GRONER.

JANUARY 30, 1933.

60 In the Court of Appeals of the District of Columbia

No. 5816, October Term, 1932

UNITED STATES OF AMERICA ON THE RELATION OF J. C. CAMPBELL, R. M. Campbell, J. R. Campbell, C. W. Amsler, and Henry Amsler, Trading as the Birch Valley Lumber Company, a Partnership, appellants

v.

THE INTERSTATE COMMERCE COMMISSION, APPELLEE

APPLICATION FOR STAY OF MANDATE

Now comes the Interstate Commerce Commission, appellee in the above-entitled cause, by counsel, and moves the Court, under Rule No. XXIV of the Rules of the Court of Appeals of the District of Columbia, to stay the mandate in said cause pending application to the Supreme Court of the United States for a writ of certiorari.

DANIEL W. KNOWLTON,
E. M. REIDY,
Attorneys for Appellee.

Acknowledgment of service

Service of copy of the above application for stay of mandate is admitted this 2nd day of February, 1933.

A. HENRY WALTER,
Attorney for Appellants.

(Endorsed:) 5816. United States of America ex rel. J. C. Campbell et al., appellants, *vs.* the Interstate Commerce Commission. Application for stay of mandate. Court of Appeals, District of Columbia. Filed February 4, 1933. Henry W. Hodges, clerk.

61 Saturday, February 4th, A. D. 1933

* * * * * * *

No. 5816

U. S. EX REL. J. C. CAMPBELL, ET AL., APPELLANTS

vs.

THE INTERSTATE COMMERCE COMMISSION

On consideration of the motion to stay the mandate herein under Rule 24 pending application for certiorari, it is ordered that the motion be, and it is hereby, granted.

62 In the Court of Appeals of the District of Columbia

No. 5816, October Term, 1932

UNITED STATES OF AMERICA ON THE RELATION OF J. C. CAMPBELL, R. M. Campbell, J. R. Campbell, C. W. Amsler, and Henry Amsler, Trading as the Birch Valley Lumber Company, a Partnership, appellants

v.

THE INTERSTATE COMMERCE COMMISSION, APPELLEE

DESIGNATION FOR TRANSCRIPT ON APPLICATION FOR WRIT OF CERTIORARI

The clerk will please prepare a transcript on application for writ of certiorari to the Supreme Court of the United States in the above-entitled cause, including therein the following:

1. The printed record in the Court of Appeals.
2. Minute entry showing argument of the cause.
3. Opinion of the court.
4. The judgment.
5. Application for stay of mandate and minute entry allowing the same.
6. This designation.
7. Clerk's certificate.

DANIEL W. KNOWLTON,
E. M. REIDY,
Attorneys for Appellee.

Acknowledgment of service

Service of a copy of the above designation is admitted this 2nd day of February, 1933.

A. HENRY WALTER,
Attorney for Appellants.

(Endorsed:) 5816. United States of America ex rel. J. C. Campbell et al., appellants, *vs.* the Interstate Commerce Commission. Designation of record. Court of Appeals, District of Columbia. Filed February 4, 1933. Henry W. Hodges, clerk.

63 Court of Appeals of the District of Columbia

I, Henry W. Hodges, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 62, inclusive, constitute a true copy of the transcript of record and proceedings of said Court of Appeals as designated by counsel in the case of United States of America on

the Relation of J. C. Campbell, R. M. Campbell, J. R. Campbell, C. W. Amsler, and Henry Amsler, Trading as the Birch Valley Lumber Company, a partnership, appellants, *vs.* Interstate Commerce Commission, No. 5816, January term, 1933, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 4th day of February, A. D. 1933.

[SEAL.] HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

U. S. GOVERNMENT PRINTING OFFICE: 1933

Supreme Court of the United States

Order allowing certiorari

Filed March 20, 1933

The petition herein for a writ of certiorari to the Court of Appeals of the District of Columbia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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